

AUG 14 1997

In The
Supreme Court of the United States

October Term, 1996

DANIEL BOGAN AND MARILYN RODERICK,
Petitioners,
vs.

JANET SCOTT-HARRIS,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

JOINT APPENDIX

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Marilyn Roderick

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Counsel of Record
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GRIFFITH
30 Federal Street
Boston, Massachusetts
02110
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Counsel for Respondent

OF COUNSEL FOR PETITIONERS:
ROBERT J. MARCHAND
DRISCOLL, MARCHAND, BOYER
& STANTON

PETITION FOR CERTIORARI FILED APRIL 4, 1997
CERTIORARI GRANTED JUNE 9, 1997

291 PP

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[NOTE: Bracketed italic material throughout indicates handwritten material in original.]

APPEAL

U.S. District Court
U.S. District Court - Massachusetts (Boston)
CIVIL DOCKET FOR CASE #: 91-CV-12057

Scott-Harris v. Fall River, Filed: 08/05/91
City of, et al Jury demand: Both
Assigned to: Nature of Suit: 442
Judge Patti B. Saris Jurisdiction: Federal Question
Demand: \$0,000
Lead Docket: None
Dkt# in other court: None
Cause: 42:1983 Civil Rights Act

JANET SCOTT-HARRIS
Plaintiff

v.

Harvey A. Schwartz
[COR LD NTC]
Schwartz, Shaw & Griffith
30 Federal Street
4th Floor
Boston, MA 02110
617-338-7277

FALL RIVER, CITY OF
Defendant

Bernadette L. Sabra
[term 03/10/93]
[COR LD NTC]
Sabra Law Offices
1026 County Street
Somerset, MA 02726
508-674-0890

Timothy E. Sterritt
[term 02/10/93]
[COR LD NTC]
6th Floor
12 Post Office Square
Boston, MA 02109
617-451-3222

DANIEL E. BOGAN,
individually and in his
former official capacity
as Mayor of the City of
Fall River, Massachusetts
Defendant

ROBERT L. CONNORS,
individually and in his
official capacity as City
Administrator of the City
of Fall River, Massachusetts
Defendant

Stephen C. Fulton
[COR LD NTC]
Fulton, Racico & Longin
200 State Street
Boston, MA 02109
617-439-4777

Bernadette L. Sabra
[term 03/10/93]
(See above)
[COR LD NTC]

Robert J. Marchand
[COR LD NTC]
206 Winter Street
P.O. Box 2527
Fall River, MA 02722

Timothy E. Sterritt
[term 02/10/93]
(See above)
[COR LD NTC]

Stephen C. Fulton
(See above)
[COR LD NTC]

Bruce A. Assad
[COR LD NTC]
10 Purchase Street
Fall River, MA 02720
508-673-2004

Bernadette L. Sabra
[term 03/10/93]
(See above)
[COR LD NTC]

Timothy E. Sterritt
[term 02/10/93]
(See above)
[COR LD NTC]

MARILYN RODERICK,
individually and in her
official capacity as a
member of the Fall River
City Council
Defendant

JOHN ALBERTO,
individually and in his
official capacity as a
member of the Fall River
City Council
Defendant

Stephen C. Fulton
(See above)
[COR LD NTC]

Bruce A. Assad
(See above)
[COR LD NTC]

Bernadette L. Sabra
[term 03/10/93]
(See above)
[COR LD NTC]

Timothy E. Sterritt
[term 02/10/93]
(See above)
[COR LD NTC]

Stephen C. Fulton
(See above)
[COR LD NTC]

Bruce A. Assad
(See above)
[COR LD NTC]

Bernadette L. Sabra
[term 03/10/93]
(See above)
[COR LD NTC]

Timothy E. Sterritt
[term 02/10/93]
(See above)
[COR LD NTC]

Stephen C. Fulton
(See above)
[COR LD NTC]

JOHN MITCHELL,
individually and in his
official capacity as a
member of the Fall River
City Council
Defendant

Bernadette L. Sabra
[term 03/10/93]
(See above)
[COR LD NTC]

Timothy E. Sterritt
[term 02/10/93]
(See above)
[COR LD NTC]

Stephen C. Fulton
(See above)
[COR LD NTC]

LEO PELLITIER,
individually and in his
official capacity as a
member of the Fall River
City Council
Defendant

Bruce A. Assad
(See above)
[COR LD NTC]

Timothy E. Sterritt
[term 02/10/93]
(See above)
[COR LD NTC]

Stephen C. Fulton
(See above)
[COR LD NTC]

MICHAEL PLASSKI,
individually and in his
official capacity as a
member of the Fall River
City Council
Defendant

Bruce A. Assad
(See above)
[COR LD NTC]

Bernadette L. Sabra
[term 03/10/93]
(See above)
[COR LD NTC]

Timothy E. Sterritt
[term 02/10/93]
(See above)
[COR LD NTC]

Stephen C. Fulton
(See above)
[COR LD NTC]

Proceedings include all events.

1:91cv12057

Scott-Harris v. Fall River, City of, et al APPEAL

8/5/91	1	Complaint filed (bdb) [Entry date 08/07/91] [1:91cv12057]
8/5/91	-	Filing fee Paid. Receipt #: 11177 Amount: \$120.00. (bdb) [Entry date 08/07/91] [1:91cv12057]
8/5/91	-	Summons(es) issued for Fall River, City of, Daniel E. Bogan, Robert L. Connors, Marilyn Roderick, John Alberto, John Mitchell, Leo Pellitier, Michael Plasski (bdb) [Entry date 08/07/91] [1:91cv12057]
9/3/91	2	Acknowledgement of service as to John Mitchell 8/27/91 Answer due on 9/16/91 for John Mitchell (cmg) [Entry date 09/06/91] [1:91cv12057]
9/3/91	3	Acknowledgement of service as to Fall River, City of 8/9/91 Answer due on 8/29/91 for Fall River, City of (cmg) [Entry date 09/06/91] [1:91CV12057]
9/3/91	4	Acknowledgement of service as to John Alberto 8/9/91 Answer due on 8/29/91 for John Alberto (cmg) [Entry date 09/06/91] [1:91cv12057]
9/3/91	5	Acknowledgement of service as to Michael Plasski 8/9/91 Answer due on 8/29/91 for Michael Plasski (cmg) [Entry date 09/06/91] [1:91cv12057]
9/3/91	6	Acknowledgement of service as to Robert L. Connors 8/9/91 Answer due

- on 8/29/91 for Robert L. Connors (cmg) [Entry date 09/06/91] [1:91cv12057]
- 9/3/91 7 Acknowledgement of service as to Marilyn Roderick 8/9/91 Answer due on 8/29/91 for Marilyn Roderick (cmg) [Entry date 09/06/91] [1:91cv12057]
- 9/3/91 8 Acknowledgement of service as to Leo Pellitier 8/13/91 Answer due on 9/2/91 for Leo Pellitier (cmg) [Entry date 09/06/91] [1:91cv12057]
- 9/3/91 9 STIPULATION by Janet Scott-Harris, Fall River, City of, Daniel E. Bogan, Robert L. Connors, Marilyn Roderick, John Alberto, John Mitchell, Leo Pellitier, Michael Plasski, extending time, reset answer due for 9/3/91 for Michael Plasski, for Leo Pellitier, for John Mitchell, for John Alberto, for Marilyn Roderick, for Robert L. Connors, for Daniel E. Bogan, for Fall River, City of, FILED. (cmg) [Entry date 09/06/91] [1:91cv12057]
- 9/3/91 10 Answer to Complaint by Fall River, City of, Daniel E. Bogan, Robert L. Connors, Marilyn Roderick, John Alberto, John Mitchell, Leo Pellitier, Michael Plasski; Jury demand (cmg) [Entry date 09/06/91] [1:91cv12057]
- 9/10/91 11 Judge Douglas P. Woodlock. Civil Order of Reference: Case referred to Magistrate Marianne B. Bowler for Rule 16b proceedings. (cmg) [1:91cv12057]
- 9/26/91 - Magistrate Marianne B. Bowler. Endorsed Order mooting [9-1] stipulation extending time, mooting [9-2] relief

- reset answer due for 9/3/91 for Michael Plasski, for Leo Pellitier, for John Mitchell, for John Alberto, for Marilyn Roderick, for Robert L. Connors, for Daniel E. Bogan, for Fall River, City of, mooting [9-3] relief (cmg) [Entry date 10/07/91] [1:91cv12057]
- 11/25/91 12 Notice of Hearing: set scheduling conference for 10:45 12/5/91 before Magistrate Marianne B. Bowler (cmg) [Entry date 11/26/91] [1:91cv12057]
- 12/5/91 14 Magistrate Marianne B. Bowler. Scheduling Order setting Status conference on 3:00 6/8/92 Discovery cutoff 6/5/92 (cmg) [Entry date 12/13/91] [1:91cv12057]
- 12/6/91 13 Notice of attorney appearance for Fall River, City of, Daniel E. Bogan, Robert L. Connors, Marilyn Roderick, John Alberto, John Mitchell, Leo Pellitier, Michael Plasski by Timothy E. Sterritt (cmg) [Entry date 12/10/91] [1:91cv12057]
- 2/5/92 15 Motion by Janet Scott-Harris to compel Discovery and/or for Other Relief to Magistrate/Judge Marianne B. Bowler (cmg) [Entry date 02/07/92] [1:91cv12057]
- 3/11/92 - Magistrate/Judge Marianne B. Bowler. Endorsed Order granting [15-1] motion to compel Discovery and/or for Other Relief, FILED. (c/s) (heb) [Entry date 03/13/92] [1:91cv12057]
- 3/17/92 16 Magistrate/Judge Marianne B. Bowler. Order: court hereby RESCINDS the

- Endorsed Order of 3/11/92; court
- ALLOWS motion to compel inasmuch
as motion is unopposed; costs are
DENIED upon further showing of sup-
port for such costs; ISSUED. (cc/cl)
(heb) [Entry date 03/19/92]
[1:91cv12057]
- 3/23/92 17 Memorandum by Janet Scott-Harris in
support of [15-1] motion to compel Dis-
covery and/or for Other Relief; FILED.
(c/s) (heb) [1:91cv12057]
- 3/25/92 18 Motion by Fall River, City of, Daniel E.
Bogan, Robert L. Connors, Marilyn
Roderick, John Alberto, John Mitchell,
Leo Pellitier, Michael Plasski to strike
parts of [17-1] support memorandum;
FILED. (c/s) (heb) [1:91cv12057]
- 3/25/92 19 Response by Fall River, City of, Daniel
E. Bogan, Robert L. Connors, Marilyn
Roderick, John Alberto, John Mitchell,
Leo Pellitier, Michael Plasski in opposi-
tion to [17-1] support memorandum;
FILED. (c/s) (heb) [1:91cv12057]
- 3/25/92 20 Affidavit of John J. Finn Re: [19-1] oppo-
sition response; FILED. (c/s) (heb)
[1:91cv12057]
- 4/7/92 - Discovery conference held (heb) [Entry
date 04/08/92] [1:91cv12057]
- 4/7/92 21 Magistrate/Judge Marianne B. Bowler.
Clerk's Notes: Discovery conference
held, reset discovery due for 10/30/92,
reset final discovery conference for
10:00 10/30/92 before Magistrate/Judge
Marianne B. Bowler; dft to supply
plaintiff with everything he has

- requested by 4/30/92; FILED. (c/s)
(heb) [Entry date 04/08/92]
[1:91cv12057]
- 4/7/92 - Magistrate/Judge Marianne B. Bowler.
Endorsed Order mootng [18-1] motion
to strike parts of [17-1] support mem-
orandum; ISSUED. (cc/cl) (heb) [Entry
date 04/08/92] [1:91cv12057]
- 4/7/92 - Magistrate/Judge Marianne B. Bowler.
Endorsed Order granting in part, deny-
ing in part [15-1] motion to compel Dis-
covery and/or for Other Relief:
ALLOWED to the extent that the dfts
are ordered to produce the documents
sought by 4/30/92; sanctions DENIED,
there having been a showing that coun-
sel's neglect was reasonable due to a
period of disability; ISSUED. (cc/cl)
(heb) [Entry date 04/08/92]
[1:91cv12057]
- 4/14/92 22 Notice of Hearing: set final discovery
conference for 10:30
6/17/92 before Magistrate/Judge Mar-
ianne B. Bowler; ISSUED. (cc/cl) (heb)
[Edit date 04/14/92] [1:91cv12057]
- 10/30/92 23 Mag/Judge Marianne B. Bowler Order;
Counsel having informed the court that
the discovery is complete with the
exception of four depositions and some
written discovery that is currently
scheduled for completion on November
30, 1992, the file is hereby returned to
the district judge for rescheduling a
final pretrial conference. . . . FILED, c.s.
(jmr) [Entry date 11/03/92]
[1:91cv12057]

- 11/30/92 - CASE NO LONGER REFERRED TO Mag. Judge Marianne B. Bowler. (tmc) [Entry date 05/24/95] [1:91cv12057]
- 12/10/92 24 Judge Douglas P. Woodlock. Order, set pretrial conference for 2:30 2/22/93 This case will be assigned for trial in April 1993. FILED (cc.cl) (jmr) [Entry date 12/11/92] [1:91cv12057]
- 1/19/93 25 Notice of attorney appearance for Daniel E. Bogan by Robert J. Marchand FILED c.s. (jmr) [1:91cv12057]
- 2/10/93 26 Notice of attorney appearance for Michael Plasski, Leo Pellitier, John Mitchell, John Alberto, Marilyn Roderick, Robert L. Connors, Daniel E. Bogan, Fall River, City of by Stephen C. Fulton FILED c.s. (jmr) [1:91cv12057]
- 2/10/93 27 NOTICE OF WITHDRAWAL of attorney Timothy E. Sterritt for Fall River, City of, attorney Timothy E. Sterritt for Daniel E. Bogan, attorney Timothy E. Sterritt for Robert L. Connors, attorney Timothy E. Sterritt for Marilyn Roderick, attorney Timothy E. Sterritt for John Alberto, attorney Timothy E. Sterritt for John Mitchell, attorney Timothy E. Sterritt for Leo Pellitier, attorney Timothy E. Sterritt for Michael Plasski FILED c.s. (jmr) [1:91cv12057]
- 2/17/93 28 Notice of attorney appearance for Michael Plasski, Leo Pellitier, John Alberto, Marilyn Roderick, Robert L. Connors by Bruce A. Assad FILED c.s. (jmr) [1:91cv12057]

- 2/17/93 29 Pretrial memorandum by Michael Plasski, Leo Pellitier, John Mitchell, John Alberto, Marilyn Roderick, Daniel E. Bogan, Fall River, City of FILED c.s. (jmr) [1:91cv12057]
- 3/10/93 30 NOTICE OF WITHDRAWAL of attorney Bernadette L. Sabra for Fall River, City of, attorney Bernadette L. Sabra for Daniel E. Bogan, attorney Bernadette L. Sabra for Robert L. Connors, attorney Bernadette L. Sabra for Marilyn Roderick, attorney Bernadette L. Sabra for John Alberto, attorney Bernadette L. Sabra for John Mitchell, attorney Bernadette L. Sabra for Michael Plasski, FILED. (c/s) (mas) [Entry date 03/12/93] [1:91cv12057]
- 3/12/93 - Pre-trial conference held (tmm) [Entry date 03/18/93] [1:91cv12057]
- 3/12/93 31 Judge Douglas P. Woodlock. Clerk's Notes: Pretrial Conference. Parties ready for trial as scheduled before the visiting judges. (tmm) [Entry date 03/18/93] [1:91cv12057]
- 3/12/93 32 Supplemental Pretrial memorandum by Janet Scott-Harris (tmm) [Entry date 03/18/93] [1:91cv12057]
- 4/8/93 36 Judge James M. Burns. Clerk's Notes: Counsel appear before visiting Judge Burns for pre-trial conference. Parties [sic] have discussed settlement but not able to settle at this time. Case is ready for trial, but attorney Fulton has vacation plans beginning April 16, 1993. Case may be impanneled on Monday April

- 12, 1993. Court will be in touch with counsel regarding trial date. FILED (jmr) [Entry date 04/26/93] [Edit date 06/15/94] [1:91cv12057]
- 4/8/93 37 Trial briefs by Janet Scott-Harris. FILED c.s. (jmr) [Entry date 04/26/93] [1:91cv12057]
- 4/12/93 33 Motion by Daniel E. Bogan to continue trial to 4/20/93, FILED. (c/s)(mas) [Entry date 04/13/93] [1:91cv12057]
- 4/12/93 34 Plaintiff's request for Jury Instructions, FILED. (mas) [Entry date 04/13/93] [1:91cv12057]
- 4/12/93 35 Motion of Stephen C. Fulton, atty. for dft., City of Fall River, to continue assigned trial date, FILED. (mas) [Entry date 04/13/93] [1:91cv12057]
- 4/12/93 38 Judge James M. Burns. Clerk's Notes: Counsel appear for jury empanelment before visiting Judge Burns. Attorney Marchand requests continuance of a trial and his client Mayor of Fall River has gone on a cruise and will not return until April 17 or 18, 1993. Court directs attorney Marchand to try to reach his client by ship to shore radio, but attorney Marchand advises the court he does not know the name of the ship his client is traveling on. Court then orders attorney Marchand to try and reach the children of his client to get information of the name of the ship. Attorney Marchand after a short recess advises the court he cannot reach his client's children. Court then holds a lengthy (3

- hour) "Settlement Conference" with all parties. Michael Fried insurance adjusts, participates by phone in settlement negotiations. Defendants are having a problem as a [sic] to the wording of a document whereby a release would be issued to the public regarding plaintiffs [sic] discrimination by the city counsel. Parties are also far apart as to the monetary amount of the settlement. Court will hold a further settlement conference in a few days. The trial is continued at this time. FILED (jmr) [Entry date 04/26/93] [1:91cv12057]
- 4/12/93 - Judge James M. Burns. Endorsed Order granting [35-1] motion to continue assigned trial date; After lengthy [sic] hearing, the within motion is allowed. FILED (cc.cl) (jmr) [Entry date 04/26/93] [1:91cv12057]
- 4/16/93 39 Judge James M. Burns. Clerk's Notes: Further settlement conference held by visiting Judge Burns. Attorneys Assad Marchant [sic] and Fried participated by telephone. The defendants are reluctant to settle and case is placed back on "Civil Master Trial List" as of May 10, 1993. FILED (jmr) [Entry date 04/26/93] [1:91cv12057]
- 7/6/93 40 Judge Samuel P. King. Clerk's Notes: Counsel appear before visiting Judge Samuel P. King for assignment for trial. Counsel advise there are no pending motions and that case is ready for trial. Trial will be jury, 4-5 days. Plaintiff Jane [sic] Scott-Harris may have a scheduling

- problem due to a job assignment, but trial is presently scheduled for Monday, 7/19/93. If Ms. Scott-Harris cannot be available, the case will come off the calendar and go back on "Master Trial List" for next available visiting Judge; set Jury trial for 9:00 on 7/19/93 before Judge Samuel P. King, FILED. (mas) [Entry date 07/08/93] [1:91cv12057]
- 10/4/93 41 Ltr. to Clerk from Harvey A. Schwartz requesting case be put back on Judge Woodlock's trial calendar, FILED. (c/s) (cmg) [Entry date 10/14/93] [1:91cv12057]
- 1/24/94 - Case reassigned from Judge Woodlock to Judge Patti B. Saris, upon appointment to the bench. Notice (1/18/94) sent to counsel. (cmg) [1:91cv12057]
- 2/7/94 42 Judge Patti B. Saris. Clerk's Notes: Pre-trial Conference held. Jury Trial (7-10 days) set for 5/9/94; 9:00, Final Pretrial Conference set for 4/27/94, at 2:00 pm all counsel to appear on [sic] person. Settlement potential negative. ISSUED PTO #33 t/b/terminated as moot. (mcm) [Entry date 02/10/94] [1:91cv12057]
- 2/10/94 43 Judge Patti B. Saris. Pretrial/Trial Pre-trial Conference set for 2:00 4/27/94, cc/cl. (mcm) [1:91cv12057]
- 2/10/94 - Judge Patti B. Saris. Endorsed Order mooting [33-1] motion to continue trial to 4/20/93 (mcm) [1:91cv12057]
- 5/4/94 44 Judge Patti B. Saris. Clerk's Notes: re: FINAL PRETRIAL CONFERENCE Court Reporter: none. JURY TRIAL date

- adjusted to 05/16/94; parties anticipate 7 trial days. Parties' pretrial findings rec'd in Court. Pltf's rsp to SJ (mtn f. in Court today) shall be f/s by 05/13/94. Motion t/b/ruled on at directed verdict stage. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 45 Proposed voir dire questions by Fall River, City of, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 46 Motion by Fall River, City of to dismiss so much of pltf's complaint as refers to Daniel Bogan, John Connors, or Marilyn Roderick "in official capacity", filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 47 Proposed verdict form received from Fall River, City of. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 48 Witness list by Fall River, City of, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 49 Exhibit list by Fall River, City of, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 50 Motion by Marilyn Roderick, Robert L. Connors, Daniel E. Bogan, Fall River, City of to dismiss Count IV of the pltf's complaint (c. 93 s. 102 claim), filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 51 Memorandum by Marilyn Roderick, Robert L. Connors, Daniel E. Bogan, Fall River, City of in support of [50-1] motion

- to dismiss Count IV of the pltf's complaint (c. 93 s. 102 claim), filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 52 Motion by Marilyn Roderick, Robert L. Connors, Daniel E. Bogan, Fall River, City of in limine for order excluding testimony of therapist Brenda Bachman as to medical treatment and prohibiting reference thereto before the jury, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 53 Proposed Jury instructions by Marilyn Roderick, Robert L. Connors, Daniel E. Bogan, Fall River, City of, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 54 Motion by Robert L. Connors to dismiss as to this dft for failure to state a claim, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 55 Memorandum by Robert L. Connors in support of [54-1] motion to dismiss as to this dft for failure to state a claim, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 56 Motion by Marilyn Roderick to dismiss as to this dft for failure to state a claim, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 57 Memorandum by Marilyn Roderick in support of [56-1] motion to dismiss as to this dft for failure to state a claim, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]

- 5/4/94 58 Motion by Daniel E. Bogan to dismiss as to this dft for failure to state a claim, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 59 Memorandum by Daniel E. Bogan in support of [58-1] motion to dismiss as to this dft for failure to state a claim, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 60 Witness list by Janet Scott-Harris, filed. (dlw) [Entry date 5/12/94] [1:91cv12057]
- 5/4/94 61 Proposed voir dire questions by Janet Scott-Harris, filed (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 62 Proposed Jury instructions by Janet Scott-Harris, filed. (dlw) [Entry date 05/12/94] [1:91cv12057]
- 5/4/94 63 Proposed verdict form received from Janet Scott-Harris. (dlw) [Entry date of 05/12/94] [1:91cv12057]
- 5/4/94 64 Proposed Joint Exhibit list by Janet Scott-Harris, filed. (dlw) [Entry date of 05/12/94] [1:91cv12057]
- 5/4/94 78 Motion by Fall River, City of for directed verdict, filed. (tmc) [Entry date 05/12/94] [1:91cv12057]
- 5/11/94 70 Letter by Harvey A. Schwartz dated: 5/10/94 to: Ms. Whitney re: has a conflict with Court for a brief period on the morning of 5/19/94, filed. (tmc) [Entry date 05/12/94] [1:91cv12057]
- 5/13/94 65 Memorandum by Janet Scott-Harris in opposition to [50-1] motion to dismiss

- Count IV of the pltf's complaint (c. 93 s. 102 claim), filed. (dlw) [Entry date of 05/12/94] [1:91cv12057]
- 5/13/94 71 Memorandum by Janet Scott-Harris in opposition to [58-1] motion to dismiss as to this dft for failure to state a claim, filed. (dlw) [Entry date of 05/12/94] [1:91cv12057]
- 5/16/94 66 Motion by Janet Scott-Harris to amend complaint, filed. (dlw) [1:91cv12057]
- 5/16/94 67 Motion by Fall River, City of for directed verdict presented at the close of the pltf's opening statement, filed. (dlw) [1:91cv12057]
- 5/16/94 68 Motion by Marilyn Roderick, Robert L. Connors for directed verdict for a directed verdict (presented at close of pltf's opening stmt., filed. (dlw) [1:91cv12057]
- 5/16/94 69 Memorandum by Janet Scott-Harris in opposition to [54-1] motion to dismiss as to this dft for failure to state a claim, filed. (dlw) [1:91cv12057]
- 5/16/94 - Jury trial held. (tmc) [Entry date 5/27/94] [1:91cv12057]
- 5/16/94 76 Judge Patti B. Saris. Clerk's Notes: re: JURY TRIAL DAY ONE (empanelment). Lobby conference held off record. Plaintiff's motion to amend complaint (m. rsp to dfts raising issue of qualified immunity) filed in court. Counsel were advised that dfts. m/d on this issue would not be addressed this late, nor

- will plaintiff's motion to amend be considered. Deft's m/d in official capacity to be granted. 8 jurors to be seated; 8 peremptories per side . . . (defts. to pool their 8 challenges). Voir dire conducted. Panel of 8 jurors seated; sworn. General Instructions given . . . Opening Statements . . . witness #1, #2 . . . Adjourned until 9:00 am 5/17/94. Court Reporter: CLOONAN (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/16/94 - Judge Patti B. Saris. Endorsed Order entered granting without opposition [46-1] motion to dismiss so much of pltf's complaint as refers to Daniel Bogan, John Connors, or Marilyn Roderick "in official capacity". cc/cl (tmc) [Entry date 05/27/94] [Edit date 06/14/94] [1:91cv12057]
- 5/16/94 - Judge Patti B. Saris. Endorsed Order entered granting without opposition [50-1] motion to dismiss Count IV of the pltf's complaint (c. 93 s. 102 claim). cc/cl (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/16/94 - Judge Patti B. Saris. Endorsed Order entered granting in part [52-1] motion in limine for order excluding testimony of therapist Brenda Bachman as to medical treatment and prohibiting reference thereto before the jury. However, the Court permits plaintiff to say she saw a Therapist. cc/cl (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/16/94 - Judge Patti B. Saris. Endorsed Order entered denying as untimely [54-1]

- motion to dismiss as to this dft for failure to state a claim. cc/cl (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/16/94 - Judge Patti B. Saris. Endorsed Order entered denying as untimely [56-1] motion to dismiss as to this dft for failure to state a claim. cc/cl (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/16/94 - Judge Patti B. Saris. Endorsed Order entered denying as untimely [58-1] motion to dismiss as to this dft for failure to state a claim. cc/cl (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/16/94 - Judge Patti B. Saris. Endorsed Order entered denying as untimely [66-1] motion to amend complaint. Also, it is unfairly prejudicial to defendant's to raise a conspiracy claim on the morning of trial after three years of litigation. cc/cl (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/16/94 - Judge Patti B. Saris. Endorsed Order entered denying [67-1] motion for directed verdict presented at the close of the pltf's opening statement. cc/cl (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/16/94 - Judge Patti B. Saris. Endorsed Order entered granting in part with respect to Mr. Connors for the reasons stated in Court, denying in part with respect to Ms. Roderick [68-1] motion for directed verdict for a directed verdict (presented at close of pltf's opening stmt.) cc/cl(tmc) [Entry date 05/27/94] [1:91cv12057]

- 5/17/94 77 Judge Patti B. Saris. Clerk's Notes: re: JURY TRIAL DATE TWO HELD: 8 jurors **SIDEBAR: re: motion issues; medical records; count 4 dismissed (state claims); witness #3 direct exam . . . ADJOURNED until 5/18/94 at 9:00 am Court Reporter: CLOONAN (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/17/94 83 Judge Patti B. Saris. Clerk's Notes: re: Jury Trial-Day Two-Note form Juror advising of inadvertent contact w/witness in elevator. Counsel advised. No action taken. Note filed. (attached to Clerks Notes) (scj) [Entry date 06/08/94] [1:91cv12057]
- 5/18/94 77 Judge Patti B. Saris. Clerk's Notes: re: JURY TRIAL DAY THREE HELD: 8 jurors . . . continuation of direct exam of wtn. #3 . . . ADJOURNED until 5/19/94 at 11:00 am. Court Reporter: CLOONAN (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/19/94 77 Judge Patti B. Saris. Clerk's Notes: re: JURY TRIAL DAY FOUR: 8 jurors, continued cross-exam of witness #3. ADJOURNED until 5/20/94 at 9:00 am. Court Reporter: CLOONAN (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/20/94 77 Judge Patti B. Saris. Clerk's Notes: re: JURY TRIAL DAY 5 HELD: witness #4: takes stand . . . EXCUSED . . . witness #5: takes stand. Court Reporter: CLOONAN (tmc) [Entry date 05/27/94] [1:91cv12057]

- 5/23/94 77 Judge Patti B. Saris. Clerk's Notes: re: JURY TRIAL DAY SIX HELD: witness #5 . . . witness #6 . . . take stand . . . Court Reporter: CLOONAN (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/24/94 77 Judge Patti B. Saris. Clerk's Notes: re: JURY TRIAL DAY SEVEN HELD: 8 jurors. witness #7: takes stand . . . witness EXCUSED . . . brief recess . . . jury excused until 11:00 am. motions to dismiss ans for directed verdict; hearing on record; ALLOWED on def. Robert Connors; DENIED on other 2 defts Bogan and Roderick). Witness #8 . . . takes stand . . . WITNESS EXCUSED. Defense rests; Plaintiff rests . . . Evidence closed. Court ADJOURNED UNTIL 9:00 am on 5/25/94. Court Reporter: CLOONAN (tmc) [Entry date 05/27/94] [Edit date 05/27/94] [1:91cv12057]
- 5/25/94 77 Judge Patti B. Saris. Clerk's Notes: re: JURY TRIAL DAY 8 HELD: 8 jurors (special verdict form distributed) . . . Closing arguments (Assad, Marchad, Fulton); Plaintiff's closing arguments (Schwartz) Brief recess; jury charge. Court Reporter: CLOONAN (tmc) [Entry date 05/27/94] [1:91cv12057]
- 5/25/94 84 Judge Patti B. Saris. Clerk's Notes: re: Jury Trial-Day Eight-Deliberations begin. Question One received at 12:00 p.m. Responses inscribed by Judge after consultation w/counsel, and question is returned to jury. Jury instructed not to dispose of question as it will be filed

- and made part of the record. Question Two received at 2:00 p.m. Responses enscribed by Judge after consultation with counsel, and question is returned to jury. Same instruction. Question Three received at 2:20 p.m. Response read in Court after consultation w/counsel. Reporter Marie Cloonan ADJOURNED until 9:00 a.m. 5/26/94 (scj) [Entry date 06/08/94] [1:91cv12057]
- 5/26/94 72 Transcript of proceedings for May 6, 1994, before Judge: Saris. Excerpt, First Day Of Trial. Court Reporter: Marie L. Cloonan, FILED. (cmg) [1:91cv12057]
- 5/26/94 73 Transcript of proceedings for May 8, 1994, before Judge: Saris. Cross-Examination by Mr. Assad of Janet L. Scott-Harris, Third Day. Court Reporter: Marie L. Cloonan, FILED. (cmg) [1:91cv12057]
- 5/26/94 74 Transcript of proceedings for May 19, 1994, before Judge: Saris. Fourth Day of Trial. Court Reporter: Marie L. Cloonan, FILED. (cmg) [1:91cv12057]
- 5/26/94 75 Transcript of proceedings for May 20, 1994, before Judge: Saris. Excerpt Fifth Day of Trial. Court Reporter: Marie L. Cloonan, FILED. (cmg) [1:91cv12057]
- 5/26/94 85 Judge Patti B. Saris . Clerk's Notes: re: Jury Trial-Day Nine-Deiliberations [sic] resume. Question 4 receieved [sic] at 10:30 a.m. Response enscribed by Judge after consultation with counsel. Question returned to jury with instructions not to dispose of it. 3:55 p.m. Verdict

reached. Reporter Marie Cloonan, Verdict form improperly filled out. (see ORIGINAL VERDICT FORM-3:55 p.m., 5/26/94 attached) Jury sent back to deliberate after curative instructions given. Question 5 received [sic] at 4:30 p.m. Response is encribed by the Judge after consultation w/counsel and returned to the jury. 5:20 p.m. Jury returns verdict. Jury finds for the plaintiff on Count II of complaint. Jury awards compensatory damages in the amount of \$156,000.00. Punitive damages awarded against defendant Roderick in the amount of \$15,000.00 and against defendant Bogan in the amount of \$60,000.00 Verdict recorded. REVISED VERDICT FORM FILED. Jury discharged. Sidebar w/counsel: Plaintiff's Motion w/supporting aff on attys fees due 6/3/94, responses due 6/10/94. Judgement will then be entered, w/post-trial motion t/b/f thereafter. Dfts orally renew motion for mistrial; DENIED (scj) [Entry date 06/08/94] [1:91cv12057]

- 6/2/94 79 Motion by Janet Scott-Harris for attorney fees, and for costs , with memorandum in support, FILED. (c/s) (cmg) [1:91cv12057]
- 6/3/94 80 Judge Patti B. Saris . Judgment entered for Janet Scott-Harris against Marilyn Roderick, Daniel E. Bogan . Principal: \$ 156,000.00 for compensatory damages, punitive damages against Marilyn Broderick in the amount of \$15,000.00 and against defendant Daniel E. Bogan on

- the amount of \$60,000.00 cc/cl (scj) [Entry date 06/06/94] [1:91cv12057]
- 6/3/94 81 Supplemental Motion by the attorney for Janet Scott-Harris for attorney fees , filed. (scj) [Entry date 06/08/94] [1:91cv12057]
- 6/3/94 82 Affidavit of Scott W. Lang, attorney for Janet Scott-Harris re: [81-1] motion for attorneys fees , filed. (scj) [Entry date 06/08/94] [1:91cv12057]
- 6/6/94 - Case closed. (scj) [Edit date 06/29/94] [1:91cv12057]
- 6/13/94 86 Motion by Fall River, City of for judgment notwithstanding the verdict based upon the facts set forth in the Defendant's motion for directed verdict filed during trial , filed. (scj) [Entry date 06/14/94] [1:91cv12057]
- 6/13/94 87 Memorandum by Fall River, City of in support of [86-1] motion for judgment notwithstanding the verdict based upon the facts set forth in the Defendant's motion for directed verdict filed during trial , filed. (scj) [Entry date 06/14/94] [1:91cv12057]
- 6/13/94 88 Certificate of service by Fall River, City of re: [86-1] motion for judgment notwithstanding the verdict based upon the facts set forth in the Defendant's motion for directed verdict filed during trial , filed. (scj) [Entry date 06/14/94] [1:91cv12057]
- 6/15/94 89 Memorandum by Janet Scott-Harris in opposition to [86-1] motion for judgment

- not withstanding the verdict based upon the facts set forth in the Defendant's motion for directed verdict filed during trial , filed. (scj) [Entry date 06/17/94] [1:91cv12057]
- 6/16/94 90 Motion by Marilyn Roderick for judgment not withstanding the verdict , filed. (scj) [Entry date 06/17/94] [1:91cv12057]
- 6/16/94 91 Memorandum by Marilyn Roderick in support of [90-1] motion for judgment not withstanding the verdict , filed. (scj) [Entry date 06/17/94] [1:91cv12057]
- 6/16/94 92 Motion by Daniel E. Bogan for judgment not withstanding the verdict , filed. (scj) [Entry date 06/17/94] [1:91cv12057]
- 6/16/94 93 Memorandum by Daniel E. Bogan in support of [92-1] motion for judgment not withstanding the verdict , filed. (scj) [Entry date 06/17/94] [1:91cv12057]
- 6/23/94 94 Memorandum by Janet Scott-Harris in opposition to [90-1] motion for judgment not withstanding the verdict filed by Marilyn Roderick and Daniel Bogan , filed. (scj) [Entry date 06/24/94] [1:91cv12057]
- 6/28/94 95 Mag. Judge Patti B. Saris . Notice of Hearing/conference: Motion hearing set for 3:00 7/27/94 for [92-1] motion for judgment not withstanding the verdict, set for 3:00 7/27/94 for [90-1] motion for judgment not withstanding the verdict, set for 3:00 7/27/94 for [86-1] motion for judgment not withstanding the verdict based upon the facts set forth in the

- Defendant's motion for directed verdict filed during trial . (scj) [Entry date 07/01/94] [1:91cv12057]
- 7/7/94 96 Letter by Harvey A. Schwartz dated: Junly [sic] 7, 1994 to: Deputy Clerk Whitney re: Second supplemental motion for attorneys fees and a request for the issue to be heard on July 27, 1994 whereas the defendant's motion for a judgement notwithstanding the verdict is to be heard at that time (scj) [1:91cv12057]
- 7/7/94 97 Second Supplemental Motion by Janet Scott-Harris for attorney fees, and for costs , filed. (scj) [1:91cv12057]
- 7/7/94 98 Affidavit of Harvey A. Schwartz , re: [97-1] motion for attorney fees, [97-2] motion for costs , filed. (scj) [1:91cv12057]
- 7/21/94 99 Plaintiff's Supplemental Memorandum by Janet Scott-Harris in opposition to [92-1] motion for judgment not withstanding the verdict, [90-1] motion for judgment not withstanding the verdict , filed. (scj) [Entry date 07/25/94] [1:91cv12057]
- 9/29/94 - Motion hearing re: [86-1] motion for judgment not withstanding the verdict based upon the facts set forth in the Defendant's motion for directed verdict filed during trial Motion hearing held, [92-1] motion for judgment not withstanding the verdict Motion hearing held, [90-1] motion for judgment not withstanding the verdict Motion hearing

held, [79-1] motion for attorney fees, [81-1] motion for attorney fees, [97-1] motion for attorney fees (scj) [Entry date 10/07/94] [1:91cv12057]

9/29/94 100 Judge Patti B. Saris . Clerk's Notes: re: Motion Hearing [86-1] motion for judgment not withstanding the verdict based upon the facts set forth in the Defendant's motion for directed verdict filed during trial taken under advisement, [92-1] motion for judgment not withstanding the verdict taken under advisement, [90-1] motion for judgment not withstanding the verdict taken under advisement, granting [79-1] motion for attorney fees, granting without opposition [81-1] motion for attorney fees, granting without opposition [97-2] motion for costs granting without opposition. ORDERED: By 10/13/94 P's Supplemental Brief is due Court Reporter: Marie Cloonan (scj) [Entry date 10/07/94] [1:91cv12057]

9/29/94 - Judge Patti B. Saris . Endorsed Order entered granting [97-1] motion for attorney fees, granting [97-2] motion for costs, granting [81-1] motion for attorney fees, granting [79-1] motion for attorney fees without opposition. (scj) [Entry date 10/07/94] [1:91cv12057]

10/19/94 101 Supplemental Memorandum by Janet Scott-Harris in opposition to [92-1] motion for judgment not withstanding the verdict filed by Bogan, [90-1] motion for judgment not withstanding the verdict filed by Roderick, [86-1] motion for judgment not withstanding the verdict

based upon the facts set forth in the Defendant's motion for directed verdict filed during trial filed by the City of Fall River , filed. (scj) [Entry date 10/24/94] [1:91cv12057]

10/25/94 102 Letter by Harvey A. Schwartz dated: October 24, 1994 to: Deputy Clerk Whitney re: Status of Settlement Negotiations As defendant's insurer made an offer of \$5,000.00 to plaintiff's attorney it now seems very unlikely the case will be settled. Therefore [sic] parties are requesting that Judge Saris begin ruling on dispositive motions that remain pending. , filed. (scj) [Entry date 10/26/94] [1:91cv12057]

11/4/95 103 Letter by Harvey A. Schwartz dated: November 4, 1994 to: Deputy Clerk Whitney re: Two Massachusetts cases that raise the same issues as are raised in the Defendant's Motions for Judgment Not Withstanding the Verdict , filed. (scj) [Entry date 11/07/94] [1:91cv12057]

1/4/95 104 Transcript filed from the eighth day of trial-closing arguments of Mr. Schwartz (scj) [1:91cv12057]

1/6/95 105 Letter by Harvey A. Schwartz dated: Jan. 4, 1995 to: Deb Whitney re: Scalia dissent in EDWARDS v. AGUILLARD, 482 U.S. 578, 636-640 . . . re S.Ct.'s historical position "that determining the subjective intent of legislators is a [sic] perilous enterprise." Case enclosed. filed. (dlw) [1:91cv12057]

- 1/27/95 106 Judge Patti B. Saris . Memorandum and Order entered. denying [86-1] motion for judgment notwithstanding the verdict based upon the facts set forth in the Defendant's motion for directed verdict filed during trial, denying [90-1] motion for judgment notwithstanding the verdict, denying [92-1] motion for judgment notwithstanding the verdict (scj) [Entry date 01/30/95] [1:91cv12057]
- 1/30/95 - Judge Patti B. Saris, by the Court, by Deputy Clerk Whitney . Endorsed Order entered denying [86-1] motion for judgment notwithstanding the verdict based upon the facts set forth in the Defendant's motion for directed verdict filed during trial, denying [90-1] motion for judgment notwithstanding the verdict, denying [92-1] motion for judgment notwithstanding the verdict for the reasons stated in the Memorandum and Order dated 1/27/95. (scj) [1:91cv12057]
- 2/6/95 - Mail sent to Stephen C. Fulton returned by Post Office because: Forwarding address expired. (scj) [1:91cv12057]
- 2/6/95 - Attorney Fulton's new address is updated-Fulton, Racico & Longin-200 State Street-Boston, MA. 02109- (617) 439-4777 (scj) [1:91cv12057]
- 2/6/95 107 Attorney Update form is forwarded to Systems Adm for update to database re: Attorney Stephen C. Fulton (scj) [1:91cv12057]
- 4/1/95 119 Motion by Marilyn Roderick to vacate [80-1] judgment order entered on June 6,

1995. filed,c/s. (scj) [Entry date 04/11/95] [Edit date 05/10/95] [1:91cv12057]
- 4/6/95 108 Letter by Harvey A. Schwartz dated: April 6, 1995 to: Mr. Fried re: Demand for payment of judgment , filed. (scj) [1:91cv12057]
- 4/7/95 109 Letter by Stephen C. Fulton dated: April 7, 1995 to: Judge Saris re: Status of Motions for Attorneys Fees: At the time of the hearing on the Motions for Judgment Notwithstanding the Verdict, there was in fact no ruling on the Motions for Attorneys Fees. On February 2, 1995 Mr. Schwartz requested a ruling on the Motions for Attorneys Fees (a copy of letter to the Clerk is attached). Mr. Fulton further requests a ruling on the matter and also that a hearing be held on the matter. filed. (scj) [Entry date 04/11/95] [1:91cv12057]
- 4/11/95 110 Motion by Marilyn Roderick, Daniel E. Bogan, Fall River, City of for an order confirming that the plaintiff's motions for attorneys fees was to be treated as a motion to alter or amend the judgment should the defendant's motions for judgment notwithstanding the verdict be denied , filed, c/s. (scj) [Edit date 05/10/95] [1:91cv12057]
- 4/11/95 111 Motion by Marilyn Roderick, Daniel E. Bogan, Fall River, City of for entry of an order and/or an amended judgment pursuant to Fed. R.Civ. P. and for notice of that entry pursuant to Fed. R.Civ. P. 77 , filed. (scj) [1:91cv12057]

- 4/11/95 112 Motion by Marilyn Roderick, Daniel E. Bogan, Fall River, City of to vacate any final judgment [sic] and any order with respect to the plaintiff's motion for attorneys fees pursuant to Fed. R.Civ. P. 60 (b)(6) , filed. (scj) [1:91cv12057]
- 4/11/95 113 Motion by Marilyn Roderick, Daniel E. Bogan, Fall River, City of to reopen the time for appeal pursuant to Fed.R.App.P. 4(a)(6) , filed. (scj) [1:91cv12057]
- 4/11/95 114 Affidavit of Stephen C. Fulton , re: [112-1] motion to vacate any final judgment [sic] and any order with respect to the plaintiff's motion for attorneys fees pursuant to Fed. R.Civ. P. 60 (b)(6), [111-1] motion for entry of an order and/or an amended judgment pursuant to Fed. R.Civ. P. and for notice of that entry pursuant to Fed. R.Civ. P. 77, [110-1] motion for an order confirming that the plaintiff's motions for attorneys fees was to be treated as a motion to alter or amend the judgment should the defendants' motions for judgment notwithstanding the verdict be denied , filed. (scj) [1:91cv12057]
- 4/11/95 115 Memorandum in support of [113-1] motion to reopen the time for appeal pursuant to Fed.R.App.P. 4(a)(6) , filed. (scj) [1:91cv12057]
- 4/11/95 116 Motion by Daniel E. Bogan to vacate [80-1] judgment order entered June 6, 1994. filed, c/s. (scj) [1:91cv12057]

- 4/11/95 117 Motion by Daniel E. Bogan to reopen the time for appeal pursuant to Fed.R. App. 4(a)(6), filed. (scj) [1:91cv12057]
- 4/11/95 118 Affidavit of Robert J. Marchand , re: [117-1] motion to reopen the time for appeal pursuant to Fed.R. App. 4(a)(6), [116-1] motion to vacate [80-1] judgment order , filed. (scj) [1:91cv12057]
- 4/11/95 120 Motion by Marilyn Roderick to reopen the time for appeal pursuant to Fed. R. App. 4(a)(6) filed, c/s. (scj) [Edit date 05/10/95] [1:91cv12057]
- 4/11/95 121 Affidavit of Bruce A. Assad , re: [120-1] motion to reopen the time for appeal pursuant to Fed. R. App. 4(a)(6) , filed. (scj) [1:91cv12057]
- 4/13/95 122 Letter by Harvey A. Schwartz dated: April 13, 1995 to: Deputy Clerk Whitney re: Transcripts of J.N.O.V. Hearing which has been ordered by the Court and a copy is to be distributed to Mr. Schwartz. , filed. (scj) [Entry date 04/18/95] [1:91cv12057]
- 4/27/95 123 Letter by Harvey A. Schwartz dated: April 26, 1995 to: Deputy Clerk Whitney re: Request for the Court to clarify whether or not a copy of the transcript will be provided automatically to each attorney in the case. filed. (scj) [Entry date 05/04/95] [1:91cv12057]
- 5/9/95 124 Motion by Janet Scott-Harris for an Evidentiary Hearing filed, c/s. (scj) [Entry date 05/10/95] [1:91cv12057]

- 5/9/95 125 Response by Janet Scott-Harris in opposition to [120-1] motion to reopen the time for appeal [sic] pursuant to Fed. R. App. 4(a)(6), [117-1] motion to reopen the time for appeal [sic] pursuant to Fed.R. App. 4(a)(6), [116-1] motion to vacate [80-1] judgment order, [113-1] motion to reopen the time for appeal pursuant to Fed.R.App.P. 4(a)(6), [112-1] motion to vacate any final judgment [sic] and any order with respect to the plaintiff's motion for attorneys fees pursuant to Fed. R.Civ. P. 60 (b)(6), [111-1] motion for entry of an order and/or an amended judgment pursuant to Fed. R.Civ. P. and for notice of that entry pursuant to Fed. R.Civ. P. 77, [110-1] motion for an order confirming that the plaintiff's motions for attorneys fees was to be treated as a motion to alter or amend the judgment should the defendants' motions for judgment notwithstanding the verdict be denied, [119-1] motion to vacate [80-1] judgment order. filed, c/s attachement exhibits A-E. (scj) [Entry date 05/10/95] [1:91cv12057]
- 5/15/95 127 Judge Patti B. Saris . Notice of Hearing/conference: Motion hearing set for 11:00 6/2/95 for [124-1] motion for an Evidentiary Hearing, set for 11:00 6/2/95 for [120-1] motion to reopen the time for appeal [sic] pursuant to Fed. R. App. 4(a)(6), set for 11:00 6/2/95 for [117-1] motion to reopen the time for appeal [sic] pursuant to Fed.R. App. 4(a)(6), set for 11:00 6/2/95 for [116-1] motion to vacate [80-1] judgment order, set for

- 11:00 6/2/95 for [113-1] motion to reopen the time for appeal [sic] pursuant to Fed.R.App.P. 4(a)(6), set for 11:00 6/2/95 for [112-1] motion to vacate any final judgment [sic] and any order with respect to the plaintiff's motion for attorneys fees pursuant to Fed. R.Civ.P. 60 (b)(6), set for 11:00 6/2/95 for [111-1] motion for entry of an order and/or an amended judgment pursuant to Fed. R.Civ. P. and for notice of that entry pursuant to Fed. R.Civ.P.77, set for 11:00 6/2/95 for [110-1] motion for an order confirming that the plaintiff's motions for attorneys fees was to be treated as a motion to alter or amend the judgment should the defendant's motions for judgment notwithstanding the verdict be denied, set for 11:00 6/2/95 for [119-1] motion to vacate [80-1] judgment order . (scj) [Entry date 05/19/95] [1:91cv12057]
- 5/17/95 126 Letter by Harvey A. Schwartz dated: May 16, 1995 to: Deputy Clerk Whitney re: First Circuit Court of Appeals Opinion in the case of Virella-Nieves v. Briggs & Stratton Corp. filed. (scj) [Entry date 05/19/95] [1:91cv12057]
- 6/1/95 128 Third Supplemental Motion by Janet Scott-Harris in 1:91-cv-12057 for attorney fees and costs. filed, c/s. (scj) [1:91cv12057]
- 6/2/95 - Motion hearing re: [110-1] motion for an order confirming that the plaintiff's motions for attorneys fees was to be treated as a motion to alter or amend the

judgment should the defendant's motions for judgment notwithstanding the verdict be denied Motion hearing held, [111-1] motion for entry of an order and/or an amended judgment pursuant to Fed. R.Civ. P. and for notice of that entry pursuant to Fed. R.Civ.P. 77 Motion hearing held, [112-1] motion to vacate any final judgment [sic] and any order with respect to the plaintiff's motion for attorneys fees pursuant to Fed. R.Civ.P. 60 (b)(6) Motion hearing held, [113-1] motion to reopen the time for appeal pursuant to Fed.R.App.P. 4(a)(6) Motion hearing held, [116-1] motion to vacate [80-1] judgment order Motion hearing held, [117-1] motion to reopen the time for appeal pursuant to Fed.R. App. 4(a)(6) Motion hearing held, [119-1] motion to vacate [80-1] judgment order Motion hearing held (scj) [Entry date 06/17/95] [1:91cv12057]

- 6/2/95 129 Judge Patti B. Saris. Clerk's Notes: re: MOTION HEARING [110-1] on motions nos. 110, 111, 112, 113, 116, 117, 119 (motions to enlarge appeal period, etc.) Pltf has now filed a third supplemental motions [sic] for attys fees. After hearing ORDERED: 1. Upon receipt of any opposition to the third supplemental motion for attys fees, the Court will rule, and a separate judgment on attorneys fees shall enter. 2. During the next two weeks, counsel shall confer re settlement. Motion for an order confirming that the plaintiff's motions for attorneys fees was to be treated as a motion to

alter or amend the judgment should the defendant's motions for judgment notwithstanding the verdict be denied taken under advisement, [111-1] motion for entry of an order and/or an amended judgment pursuant to Fed. R.Civ. P. and for notice of that entry pursuant to Fed. R.Civ.P. 77 taken under advisement, [112-1] motion to vacate any final judgment [sic] and any order with respect to the plaintiff's motion for attorneys fees pursuant to Fed.R.Civ.P. 60 (b)(6) taken under advisement, [113-1] motion to reopen the time for appeal pursuant to Fed.R.App.P. 4(a)(6) taken under advisement, [116-1] motion to vacate [80-1] judgment order taken under advisement, [117-1] motion to reopen the time for appeal pursuant to Fed.R.App. 4(a)(6) taken under advisement, [119-1] motion to vacate [80-1] judgment order taken under advisement. Copies of this minute order mailed to counsel of record. Court Reporter: Marie Cloonan (scj) [Entry date 06/17/95] [1:91cv12057]

- 6/16/95 130 Response by Fall River, City of in 1:91-cv-12057 in opposition to [128-1] motion for attorney fees and costs, filed. (scj) [Entry date 06/17/95] [1:91cv12057]
- 6/21/95 131 Response by Marilyn Roderick in 1:91-cv-12057 in opposition to [128-1] motion for attorney fees and costs, filed. (scj) [1:91cv12057]
- 6/28/95 - Judge Patti B. Saris. Endorsed Order entered denying in part [128-1] motion

for attorney fees and costs. "I do not believe it is reasonable to compensate plaintiff's counsel for time spent in the Mass G.L. Ch. 93 A action against the insurer in state court. Plaintiff's counsel shall submit a proposed form of judgment consistent with the ruling. (endorsement on opposition filed in Court on June 23, 1995) (scj) [Entry date 07/10/95] [Edit date 09/13/95] [1:91cv12057]

- 7/12/95 - Proposed Order of Judgment by Michael Plasski in 1:91-cv-12057, Leo Pellitier in 1:91-cv-12057, John Mitchell in 1:91-cv-12057, John Alberto in 1:91-cv-12057, Marilyn Roderick in 1:91-cv-12057, Robert L. Connors in 1:91-cv-12057, Daniel E. Bogan in 1:91-cv-12057, Fall River, City of in 1:91-cv-12057, Janet Scott-Harris in 1:91-cv-12057 received for filing. (scj) [1:91cv12057]
- 7/28/95 132 Transcript of proceedings for held on proceeding date: 9/29/94 before Judge: Saris. Court Reporter: Cloonan (sad) [1:91cv12057]
- 8/2/95 133 Notice of change of address filed by Harvey A. Schwartz and Siobhan M. Sweeney in 1:91-cv-12057 of the firm of Schwartz, Shaw & Griffith. Attorney update forms forwarded to Systems Office (scj) [1:91cv12057]
- 8/11/95 134 Judge Patti B. Saris. Memorandum and Order entered. denying [110-1] motion for an order confirming that the plaintiff's motions for attorneys fees was to be treated as a motion to alter or amend

the judgment should the defendant's motions for judgment notwithstanding the verdict be denied denying [111-1] motion for entry of an order and/or an amended judgment pursuant to Fed. R.Civ. P. and for notice of that entry pursuant to Fed. R.Civ.P.77 denying [112-1] motion to vacate any final judgment [sic] and any order with respect to the plaintiff's motion for attorneys fees pursuant to Fed. R.Civ.P. 60 (b)(6) granting [113-1] motion to reopen the time for appeal pursuant to Fed.R.App.P. 4(a)(6) denying [116-1] motion to vacate [80-1] judgment order granting [117-1] motion to reopen the time for appeal pursuant to Fed.R. App. 4(a)(6) denying [119-1] motion to vacate [80-1] judgment order granting [120-1] motion to reopen the time for appeal pursuant to Fed. R. App. 4(a)(6) mooted [124-1] motion for an Evidentiary Hearing: FOR THE FOREGOING REASONS, THE COURT ALLOWS DEFENDANTS' MOTIONS TO REOPEN THE TIME FOR APPEAL PURSUANT TO FED. R. APP. P. 4(a)(6). . . . THE COURT DENIES THE DEFENDANTS' MOTIONS (1) TO CONFIRM THAT PLTF'S MOTIONS FOR ATTORNEYS FEES WERE T/B/TREATED AS A MOTION TO ALTER OR AMEND; (2) TO VACATE ANY FINAL JUDGMENT AND ORDER WITH RESPECT TO PLTF'S MOTION FOR ATTORNEYS FEES PURSUANT TO FED. R. CIV. P. 60(b)(6) AND REENTER THE SAME; AND (3) TO ENTER AN

AMENDED JUDGMENT PRUSUANT [sic] TO FED. R. CIV. P. 58 AND PROVIDE NOTICE OF THAT ENTRY PURSUANT TO FED. R. CIV. P. 77. This order was entered on the docket on 08/14/95 (dw), f. cc/cl (dlw) [Entry date 08/14/95] [1:91cv12057]

- 8/14/95 135 ORDER OF JUDGMENT ON ATTORNEYS FEES entered: Pursuant to Fed.R.Civ.P. 54(d)(2)(C), ATTORNEYS FEES AND COSTS ARE AWARDED TO THE PLAINTIFF, JANET SCOTT-HARRIS, IN THE TOTAL AMOUNT OF EIGHTY-THREE THOUSAND ONE HUNDRED SEVENTY-NINE DOLLARS AND SEVENTY CENTS (\$83,179.70) AGAINST THE DEFENDANTS CITY OF FALL RIVER, MARILYN RODERICK AND DANIEL E. BOGAN, JOINTLY AND SEVERALLY. The current rate of post-judgment interest is 5.7% per annum. cc/cl (dlw) [Edit date 08/15/95] [1:91cv12057]
- 8/18/95 136 Notice of appeal by Fall River, City of in 1:91-cv-12057 filed. Fee Status: pd Fee Amount: \$ 105.00 Receipt #: 110975 Appeal record due on 9/17/95 (mmh) [Entry date 08/28/95] [1:91cv12057]
- 8/21/95 137 Notice of appeal by Marilyn Roderick in 1:91-cv-12057 filed. Fee Status: pd Fee Amount: \$ 105.00 Receipt #: 110995 Appeal record due on 9/20/95 (mmh) [Entry date 08/28/95] [1:91cv12057]
- 8/24/95 138 Notice of appeal by Daniel E. Bogan in 1:91-cv-12057 filed. Fee Status: pd Fee Amount: \$ 105.00 Receipt #: 111101

Appeal record due on 9/23/95 (mmh) [Entry date 08/28/95] [1:91cv12057]

- 8/28/95 139 Letter by Stephen C. Fulton in 1:91-cv-12057 dated: August 28, 1995 to: Ms. Cloonan re: Request for transcripts on behalf of all defendants. filed. (scj) [Entry date 08/31/95] [1:91cv12057]
- 8/28/95 - Notice of Docketing Record on Appeal from USCA re: , received. USCA NUMBER: 95-1952 (mmh) [Entry date 09/07/95] [1:91cv12057]
- 9/1/95 - Certified copy of docket and record on appeal forwarded to U.S. Court of Appeals re: . (mmh) [Entry date 09/05/95] [1:91cv12057]
- 9/6/95 143 Notice of appeal by Janet Scott-Harris in 1:91-cv-12057 filed. Appeal record due on 10/6/95 (mmh) [Entry date 10/02/95] [1:91cv12057]
- 9/7/95 - Notice of Docketing Record on Appeal from USCA re: , received. USCA NUMBER: 95-1950, 95-1951 (mmh) [1:91cv12057]
- 9/7/95 140 Letter by Stephen C. Fulton in 1:91-cv-12057 dated: 9/5/95 to: Ms. Whitney: re: In reviewing the Court's judgment on Attny's fees dated 8/14/95 I noticed that no mention was made of the plaintiff's third supplemental motion for attorneys fees. . . . (see letter), filed. (tap) [Entry date 09/08/95] [1:91cv12057]
- 9/13/95 - Docket entry dated 06/28/95 (endorsement on #128, third supplemental motion for attorneys fees) EDITED to

reflect that the motion was DENIED IN PART. Counsel's claim for time spent on the c.93A action against the insurer was specifically EXCLUDED. Otherwise, the third supplemental fee petition was allowed. (dlw) [1:91cv12057]

- 9/13/95 - Followup telecon. w/Atty Sweeney of Harvey Schwartz' office, re ltr dated 09/05/95 (docket no. 140). Atty Schwartz' assertion in ltr that judgment on attorneys fees is incorrect as to amount is correct (see above remark of this date). Counsel will move for amended judgment on attorneys fees. ' (dlw) [1:91cv12057]
- 9/15/95 141 Motion by Janet Scott-Harris in 1:91-cv-12057 to amend [135-1] judgment on attorneys fees, filed. (dlw) [1:91cv12057]
- 9/22/95 142 Motion by Janet Scott-Harris in 1:91-cv-12057 for leave to file a notice of appeal on the grounds that the original Notice of Appeal was served and mailed to the Clerk's Office on September 5, 1995, however it was never received for docketing. filed, c/s. (scj) [Entry date 09/25/95] [Edit date 10/04/95] [1:91cv12057]
- 9/28/95 - Second Notice of Appeal received for filing with the Office of the Clerk - (Notice is held in the session while original notice is being searched for in the District Court as well as the Court of Appeals) (scj) [Entry date 10/04/95] [1:91cv12057]

- 9/29/95 - Judge Patti B. Saris. Endorsed Order entered granting without opposition [141-1] motion to amend [135-1] judgment on attorneys fees, cc/cl w/77(d) certificate. (dlw) [Entry date 10/06/95] [1:91cv12057]
- 10/2/95 - Original Notice of Appeal, which was mailed to the District Court on September 5, 1995 is recovered by the Appeals Coordinator. Original Notice was found to have been routed to the Court of Appeals, prior to docketing in the District Court. (scj) [Entry date 10/04/95] [1:91cv12057]
- 10/6/95 19 Judge Patti B. Saris. AMENDED Judgment on attorneys fees entered for Janet Scott-Harris in 1:91-cv-12057 against Marilyn Roderick in 1:91-cv-12057, Daniel E. Bogan in 1:91-cv-12057, City of Fall River, jointly and severally, in 1:91-cv-12057. Principal: \$ 90,401.18, and post-judgment interest at the rate of of [sic] 5.89% per annum; cc/cl w/77(d) certificate. (dlw) [1:91cv12057]
- 10/11/95 - Notice of Docketing Record on Appeal from USCA re: , received. USCA NUMBER: 95-2100 (mmh) [Entry date 10/13/95] [1:91cv12057]
- 10/12/95 - Certified copy of docket and record on appeal forwarded to U.S. Court of Appeals re: . (mmh) [Entry date 10/13/95] [1:91cv12057]
- 10/23/95 - USCA appeal fees received Fee Status: pd Fee Amount: \$ 105.00 Receipt #: 112140 (mmh) [1:91cv12057]

- 10/25/95 144 Notice to counsel that exhibits shall be disposed of if they are not picked up within 30 days of the date of this notice. Documentary exhibits are returned herewith. Counsel should make arrangements to collect the remaining oversized exhibits. cc/cl by DLW (scj) [Entry date 11/07/95] [Edit date 11/07/95] [1:91cv12057]
- 11/3/95 145 Letter dated: November 3, 1995 to: Steve Fulton re: Request that counsel distribute the documentary exhibits enclosed with notice issued on 10/25/95. cc/cl (scj) [Entry date 11/07/95] [Edit date 11/07/95] [1:91cv12057]
- 11/8/95 146 Joint motion by Michael Plasski in 1:91-cv-12057, Leo Pellitier in 1:91-cv-12057, John Mitchell in 1:91-cv-12057, John Alberto in 1:91-cv-12057, Marilyn Roderick in 1:91-cv-12057, Robert L. Connors in 1:91-cv-12057, Daniel E. Bogan in 1:91-cv-12057, Fall River, City of in 1:91-cv-12057 to extend time to January 15, 1996 to to [sic] designate appendix contents and file their briefs. filed, c/s (scj) [Entry date 11/10/95] [Edit date 05/14/96] [1:91cv12057]
- 3/6/96 - Terminated document mooted [22-1] joint motion to extend time to January 15, 1996 to to [sic] designate appendix contents and file their briefs mooted [142-1] motion for leave to file a notice of appeal on the grounds that the original Notice of Appeal was served and mailed to the Clerk's Office on September 5, 1995, however it was never

- received for docketing Requested by dw. (dlw) [1:91cv12057]
- 5/14/96 147 Transcript of proceedings for held on proceeding date: May 16, 1994 before Judge: Saris. Court Reporter: Marie Cloonan (scj) [Edit date 05/14/96] [1:91cv12057]
- 5/14/96 148 Transcript of proceedings for held on proceeding date: May 17, 1994 before Judge: Saris. Court Reporter: Marie Cloonan (scj) [Edit date 05/14/96] [1:91cv12057]
- 5/14/96 149 Transcript of proceedings for held on proceeding date: May 18, 1994 before Judge: Saris. Court Reporter: Marie Cloonan (scj) [1:91cv12057]
- 5/14/96 150 Transcript of proceedings for held on proceeding date: May 20, 1994 before Judge: Saris. Court Reporter: Marie Cloonan (scj) [1:91cv12057]
- 5/14/96 151 Transcript of proceedings for held on proceeding date: May 23, 1994 before Judge: Saris. Court Reporter: Marie Cloonan (scj) [1:91cv12057]
- 5/14/96 152 Transcript of proceedings for held on proceeding date: May 24, 1994 before Judge: Saris. Court Reporter: Marie Cloonan (scj) [1:91cv12057]
- 5/14/96 153 Transcript of proceedings for held on proceeding date: May 25, 1994 before Judge: Saris. Court Reporter: Marie Cloonan (scj) [1:91cv12057]

5/23/96 - Transmitted supplemental record on
 appeal: re: . (mmh) [Entry date
 05/24/96] [1:91cv12057]

UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS)

Plaintiff)

v.)

CITY OF FALL RIVER,)

MASSACHUSETTS; DANIEL E.) **91-12057WD**

BOGAN, individually and in his)
 former official capacity as Mayor)
 of the City of Fall River,)

Massachusetts; ROBERT L.)

CONNORS, individually and in)
 his official capacity as City)

Administrator of the City of Fall)
 River, Massachusetts; MARILYN)

RODERICK, individually and in) (Filed
 her official capacity as a member) Aug. 5, 1991)
 of the Fall River City Council;)

JOHN ALBERTO, individually)
 and in his official capacity as a)
 member of the Fall River City)

Council; JOHN MITCHELL,)
 individually and in his official)
 capacity as a member of the Fall)

River City Council; LEO)

PELLITIER, individually and in)
 his official capacity as a member)
 of the Fall River City Council;)

and MICHAEL PLASSKI,)

individually and in his official)
 capacity as a member of the Fall)
 River City Council)

Defendants)

COMPLAINT

Introduction

1. This is a civil rights action against the City of Fall River, Massachusetts, its former mayor, city administrator and members of the city council for the racially and sexually motivated discharge of the city's Administrator of Health and Human Services. The complaint alleges that Ms. Scott-Harris' position was eliminated in a sham budget-cutting action because she was Black, because she was a woman, because she was outspoken in her opposition to racism among city employees and because she was not a member of the City Hall establishment. The complaint seeks compensatory and punitive damages.

Jurisdiction and venue

2. This action is brought pursuant to 42 U.S.C. §§ 1981 and 1983 and the First and Fourteenth Amendments to the United States Constitution. Jurisdiction is founded on 28 U.S.C. §§ 1331 and 1343.
3. The plaintiff further invokes the supplemental jurisdiction of this Court pursuant to 28 U.S.C. §1367 and the pendent jurisdiction of this Court to hear and decide her claims arising under state law.
4. All individual parties are residents of Massachusetts. The municipal defendant is located in Massachusetts.

Parties

5. Plaintiff Janet Scott-Harris is a citizen of the United States and a resident of the Commonwealth of Massachusetts. She is a Black woman.

6. The defendant City of Fall River, Massachusetts is a municipal corporation formed under the laws of the Commonwealth of Massachusetts. It is a subdivision of the Commonwealth of Massachusetts.
7. The defendant Daniel E. Bogan was at times relevant to this action the acting Mayor of the City of Fall River. He is a citizen of the United States and a resident of Fall River. He is named in his official and his individual capacities.
8. The defendant Robert L. Connors was at times relevant to this action the City Administrator of the City of Fall River. He is a citizen of the United States and a resident of Fall River. He is named in his official and his individual capacities.
9. The defendant Marilyn Roderick, was at times relevant to this action a member of the Fall River City Council. She is a citizen of the United States and a resident of Fall River. She is named in her official and her individual capacities.
10. The defendant John Alberto, was at times relevant to this action a member of the Fall River City Council. He is a citizen of the United States and a resident of Fall River. He is named in his official and his individual capacities.
11. The defendant John Mitchell was at times relevant to this action a member of the Fall River City Council. He is a citizen of the United States and a resident of Fall River. He is named in his official and his individual capacities.
12. The defendant Leo Pellitier was at times relevant to this action a member of the Fall River City Council. He is a citizen of the United States and a resident of Fall River. He is named in his official and his individual capacities.

13. The defendant Michael Plasski was at times relevant to this action a member of the Fall River City Council. He is a citizen of the United States and a resident of Fall River. He is named in his official and his individual capacities.

Facts

14. In 1987 as part of a reorganization of city government based on the recommendations of the Fall River Area Task Force, a number of health and human services agencies of the city were placed under the supervision of a newly-created position of Administrator of Health and Human Services.
15. Following a nationwide search, Ms. Scott-Harris was offered the post of Administrator of Health and Human Services.
16. In reliance on that offer Ms. Scott-Harris resigned from a position in Ohio and relocated with her family to Fall River. She began working for the city in September 1987.
17. During the period of her employment in Fall River the administration of the city government was made up almost entirely of white males. Ms. Scott-Harris was the only black person in an administrative position. She was one of only three women in administrative positions.
18. Ms. Scott-Harris refused to tolerate racial bias among city employees in her departments. Her refusal to accept this attitude upset the city government establishment.
19. As an example, Ms. Scott-Harris was instrumental in insisting on the dismissal of a supervisory employee

- who publicly referred to black employees as "niggers" and "black bitches" and who referred to Ms. Scott-Harris as "that black nigger bitch."
20. That employee who Ms. Scott-Harris insisted be dismissed was a longtime city employee with political connections throughout the administration.
21. The employee was placed on suspension without pay as a direct result of Ms. Scott-Harris' efforts but the employee was then permitted to immediately apply for and obtain disability pay while she purportedly was under the direct treatment of the chairman of the city's board of health. The employee was removed from disability status the day after Ms. Scott-Harris was terminated and was promoted to a new position with an additional cost to the city of \$18,000.
22. Ms. Scott-Harris was treated differently in the terms and conditions of her employment than were white males in comparable positions.
23. As an example, Ms. Scott-Harris was denied administrative benefits allowed to white male city administrators in comparable positions, such as the use of a city automobile, out-of-state travel and even an assigned parking place.
24. On February 12, 1991 Ms. Scott-Harris was informed by the defendant Connors, the City Administrator, that her position was to be eliminated by the City Council for economic reasons. He said her last day of employment would be March 29, 1991.
25. On March 26, 1991 the defendant members of the Fall River City Council voted to eliminate Ms. Scott-Harris' position.
26. The reason given for Ms. Scott-Harris' termination was a sham.

27. The vote to eliminate Ms. Scott-Harris' position entirely was a sham undertaken only because the defendant Bogan, as an acting mayor only, was without authority to terminate her.
28. No other members of the city administration were terminated "for economic reasons."
29. No other cutbacks in city government were taken for "economic reasons."
30. The defendants Mayor Bogan and City Administrator Connors publicly stated at City Council meetings and in newspaper interviews at various times in March 1991 that they had no complaints about the plaintiff's performance of her duties and, in fact, that they were pleased with Ms. Scott-Harris' performance. They said she was being eliminated solely for economic reasons.
31. The elimination of Ms. Scott-Harris' position did not save any money for the city because her duties were reassigned to three positions that at the time of her termination were vacant. Within one month of Ms. Scott-Harris' discharge the city hired two white males and one white female to perform the duties Ms. Scott-Harris had previously performed. Ms. Scott-Harris' annual salary had been \$48,000. The combined annual salaries of the three persons hired to replace Ms. Scott-Harris were \$105,000.
32. On February 20, 1991 Mayor Bogan wrote to Ms. Scott-Harris informing her that her position was to be eliminated because of "an anticipated 10% reduction in local aid for FY92."
33. In fact, Ms. Scott-Harris was fired in the midst of Fiscal Year 1991, when funds for her position had already been appropriated and were available. In addition, the city's state aid was not reduced by 10

- percent for fiscal year 1992 and the city never instituted other employee layoffs for "economic reasons."
34. In his February 20, 1991 letter Mayor Bogan offered Ms. Scott-Harris the position of Director of Public Health at a salary reduction of nearly \$12,000.
 35. The offer of the position of Director of Public Health was a sham. Mayor Bogan did not believe Ms. Scott-Harris would accept a position with such a drastic salary reduction.
 36. On February 28, 1991 Ms. Scott-Harris wrote to Mayor Bogan and stated that she would "accept your most gracious offer, appointment to the position Director, Public Health."
 37. Surprised that Ms. Scott-Harris had accepted the position, Mayor Bogan wrote to her on March 1, 1991 stating that he was imposing a number of additional duties not included in the position when it was offered to Ms. Scott-Harris. These additional duties and responsibilities included supervision of such disparate departments as Minimum Housing, Food & Milk inspections, sanitary inspections, and weights and measures. He also told Ms. Scott-Harris that the office of the director of public health was being relocated to a less desirable location.
 38. On March 4, 1991 Ms. Scott-Harris wrote to Mayor Bogan expressing her concern about the additional responsibilities and duties imposed on the position as compared with the previous status of the position since there was to be no increase in compensation. She requested that he provide her with "a complete outline, projects to be managed, positions to be directed, with staffing, location and budget assignments," which information, she said, "would be helpful toward resolution of these concerns."

39. Mayor Bogan treated Ms. Scott-Harris' March 4, 1991 letter as a rejection of his employment offer and refused to discuss the matter further with Ms. Scott-Harris or her attorney, announcing publicly that she had declined the job offer.
40. The individual defendants are the policy making officials of the City of Fall River.
41. In all of the above actions the defendants were acting under color of the laws of the Commonwealth of Massachusetts.
42. All of the above actions were taken deliberately and with the intention of depriving Ms. Scott-Harris of her position with the City of Fall River and with the intention of treating Ms. Scott-Harris under different terms and conditions in her employment than white males were treated.
43. All of the above actions were taken in retaliation for Ms. Scott-Harris' refusal to tolerate a racially discriminatory atmosphere among the employees she supervised.

COUNT ONE
EQUAL PROTECTION VIOLATION
42 U.S.C. §§ 1981 and 1983 claim

The plaintiff repeats and realleges all the foregoing paragraphs.

44. By the above conduct the defendants violated the plaintiff's right to equal protection of the laws, as provided by the Fourteenth Amendment to the United States Constitution.

COUNT TWO
FREE SPEECH VIOLATION
42 U.S.C. § 1983 claim

The plaintiff repeats and realleges all the foregoing paragraphs.

45. By the above conduct the defendants violated the plaintiff's right to freedom of speech, as provided by the First and Fourteenth Amendments to the United States Constitution.

COUNT THREE
WRONGFUL TERMINATION
Massachusetts common law claim

The plaintiff repeats and realleges all the foregoing paragraphs.

46. The plaintiff was discharged from her position for reasons in violation of public policy.
47. The plaintiff relied on the defendant city's offer of employment to her detriment by giving up her existing employment and by relocating with her family to Fall River.
48. This detrimental reliance by the plaintiff created an implied contract of employment that she could only be terminated for cause.
49. The defendants had no cause for terminating the plaintiff's employment.

COUNT FOUR
MASSACHUSETTS EQUAL RIGHTS ACT
M.G.L. c. 93 § 102 claim

The plaintiff repeats and realleges all the foregoing paragraphs.

50. The plaintiff was discriminated against in the terms and conditions of her employment and was terminated from her employment because of her race and her sex, in violation of her rights as provided by M.G.L. c. 93 § 102.

AS A RESULT of the above conduct by the defendants the plaintiff was denied her employment and the benefits of that employment, her reputation and good name were damaged, and she suffered great emotional distress and anxiety.

WHEREFORE the plaintiff demands judgment against the defendants, jointly and severally, for the full amount of her damages, plus punitive damages, plus her costs of this action, including reasonable attorneys fees, and prejudgment interest pursuant to state and federal law.

Jury demand

The plaintiff demands trial by jury.

Janet Scott-Harris, plaintiff
By her attorneys,

/s/ Harvey A. Schwartz
HARVEY A. SCHWARTZ
Schwartz, Shaw & Griffith
205 Portland Street
Boston, Massachusetts 02114
(617) 227-2414
BBO # 448080

UNITED STATE [sic] DISTRICT COURT DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS)	C.A. NO. 91-12057WD
)	
Plaintiff)	
)	
V.)	
)	
CITY OF FALL RIVER)	
MASSACHUSETTS, et al.)	
)	
Defendants)	

ANSWER OF DEFENDANT CITY OF FALL RIVER,
DANIEL E. BOGAN, ROBERT L. CONNORS,
MARILYN RODERICK, JOHN ALBERTO
JOHN MITCHELL, LEO PELLETIER
AND MICHAEL PLASSKI

INTRODUCTION

1. The Defendants deny the allegations contained in Paragraph 1.

JURISDICTION AND VENUE

2. The statements contained in Paragraph 2 are statements of jurisdiction to which an answer is not required.
3. The statements contained in Paragraph 3 regard jurisdiction and do not, therefore, require an answer.
4. The Defendants admit the allegations contained in Paragraph 4.

PARTIES

5. The Defendants admit the allegations contained in Paragraph 5.

6. The Defendants admit the allegation is contained in Paragraph 6.

7. The Defendants admit the allegations contained in Paragraph 7.

8. The Defendants admit the allegations contained in Paragraph 8.

9. The Defendants admit the allegations contained in Paragraph 9.

10. The Defendants admit the allegations contained in Paragraph 10.

11. The Defendants admit the allegations contained in Paragraph 11.

12. The Defendants admit the allegations contained in Paragraph 12.

13. The Defendants admit the allegations contained in Paragraph 13.

FACTS

14. The Defendants admit the allegations contained in Paragraph 14.

15. The Defendants admit the allegations contained in Paragraph 15.

16. The Defendants admit that the Plaintiff accepted the position in Fall River and began working here in

September of 1987. The defendants are without sufficient knowledge or belief as to the remaining allegations and therefore deny same.

17. The Defendants admit the allegations contained in Paragraph 17.

18. The Defendants are without sufficient knowledge or belief as to the allegations contained in Paragraph 18 and therefore deny same.

19. The Defendants admit that the Plaintiff complained against an employee of the City of Fall River for racial remarks and that the employee was immediately disciplined according to the Civil Service procedures and progressive discipline policies of the City.

20. The Defendants admit that the employee involved in the disciplinary action worked for the City for a number of years but are without sufficient knowledge or belief to admit the remaining allegations contained in Paragraph 20, and therefore deny same.

21. The Defendants admit that the employee was suspended and that the employee thereafter qualified for a medical disability but deny that the employee was promoted upon returning to work and deny the remaining allegations and inferences contained in Paragraph 21.

22. The Defendants deny the allegations contained in Paragraph 22.

23. The Defendants deny the allegations contained in Paragraph 23.

24. The Defendants admit that at a meeting of all department heads, Plaintiff was told of the elimination of

her position in the context of the budgetary constraints facing the City and that the City Council would be taking action on eliminating the position. The last day of her employment was calculated in an effort to facilitate continued salary payments to the Plaintiff for unused sick time and vacation time through the end of the fiscal year.

25. The Defendants admit the allegations contained in Paragraph 26.

26. The Defendants deny the allegations contained in Paragraph 26.

27. The Defendants deny the allegations contained in Paragraph 27.

28. The Defendants deny the allegations contained in Paragraph 28.

29. The Defendants deny the allegations contained in Paragraph 29.

30. The Defendants admit the allegations contained in Paragraph 30.

31. The Defendants deny the allegations contained in Paragraph 31.

32. The Defendants admit the allegations contained in Paragraph 32.

33. The Defendants deny the allegations contained in Paragraph 33 and further state that the termination date was calculated so that the Plaintiff would continue to receive regular salary payments through the end of the fiscal year based upon unused sick time and vacation time. In addition, state aid was reduced by more than 10

percent for fiscal year 1992 and other employees were laid off for economic reasons.

34. The Defendants admit the allegations contained in Paragraph 34.

35. The Defendants deny the allegations contained in Paragraph 35.

36. The Defendants admit the allegations contained in Paragraph 36.

37. The Defendants deny the allegations contained in Paragraph 37.

38. The Defendants admit that a letter was received from the Plaintiff dated March 4, 1991 but deny the remaining allegations contained in Paragraph 38.

39. The Defendants admit that Mayor Bogan acknowledged the Plaintiff's decision not to accept the position of Director of Public Health, but deny the remaining allegations contained in Paragraph 39.

40. The Defendants admit the allegations contained in Paragraph 40.

41. The Defendants admit the allegations contained in Paragraph 41.

42. The Defendants deny the allegations contained in Paragraph 42.

43. The Defendants deny the allegations contained in Paragraph 43.

44. The Defendants deny the allegations contained in Paragraph 45 [sic].

45. The Defendants deny the allegations contained in Paragraph 45.

46. The Defendants deny the allegations contained in Paragraph 46.

47. The Defendants deny the allegations contained in Paragraph 47.

48. The Defendants deny the allegations contained in Paragraph 48.

49. The Defendants deny the allegations contained in Paragraph 49.

50. The Defendants deny the allegations contained in Paragraph 50.

WHEREFORE, the Defendants request this complaint to be dismissed with costs and attorney's fees.

FIRST AFFIRMATIVE DEFENSE

1. Plaintiff's Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

2. The Defendants state that service of the Complaint was improper and insufficient.

THIRD AFFIRMATIVE DEFENSE

3. Plaintiff's Complaint fails to state a claim upon which relief can be granted under 42 U.S.C. Sec. 1981 and 1983 because the facts alleged do not constitute a violation of the Plaintiff's right to equal protection of the laws.

FOURTH AFFIRMATIVE DEFENSE

4. The actions of the Defendants were taken in good faith and in proper exercise of their public duties pursuant to established policies.

FIFTH AFFIRMATIVE DEFENSE

5. The Plaintiff's claim fails to state any valid claim under Federal Law and accordingly, this Court lacks jurisdiction over the subject matter of any alleged claims by Plaintiff under State Law, and Plaintiff's Complaint should therefore be dismissed.

SIXTH AFFIRMATIVE DEFENSE

6. The Defendants state that their actions were in good faith based on a reasonable belief that those actions were constitutionally proper.

SEVENTH AFFIRMATIVE DEFENSE

7. The individually-named Defendants were acting solely in the course of their public office and in the best interest of the City of Fall River, and are therefore inappropriately named as Defendants in their individual capacities.

EIGHTH AFFIRMATIVE DEFENSE

8. The Plaintiff's Complaint fails to state any basis upon which a claim exists for violation of the Plaintiff's right to freedom of speech, and should therefore be dismissed.

NINTH AFFIRMATIVE DEFENSE

9. The Plaintiff's rejection of the alternate position offered to her after the elimination of her position through the restructuring of the City administration, was the sole reason for departure from City employment and does not constitute wrongful termination.

TENTH AFFIRMATIVE DEFENSE

10. The Plaintiff has failed to state any factual basis for her claim under the state equal rights act that she was discriminated against because her race and gender, and such claim should accordingly be dismissed.

ELEVENTH AFFIRMATIVE DEFENSE

11. The Plaintiff knew or should have known of the financial and budgetary problems confronting the City of Fall River and that elimination of her position to return to a prior organizational system was a necessary and justifiable cost-cutting measure.

TWELFTH AFFIRMATIVE DEFENSE

12. The Plaintiff's claim that she was terminated due to her race and gender is without a factual basis and are matters which the Plaintiff has conceded were not factors in the elimination of her position.

WHEREFORE, the Plaintiff's Complaint should be dismissed with costs.

THE DEFENDANTS REQUEST A TRIAL BY JURY.

CITY OF FALL RIVER, MA,
DANIEL E. BOGAN, ROBERT L.
CONNORS, MARILYN
RODERICK, JOHN ALBERTO,
JOHN MITCHELL, LEO
PELLETIER AND MICHAEL
PLASSKI

By their attorney,

/s/ Bernadette L. Sabra
Bernadette L. Sabra
Assistant Corporation
Counsel
BBO #4370201
Law Dept.,
1 Government Center
Fall River, MA 02722
(508) 324-2650

Dated: August 29, 1991

CERTIFICATE OF SERVICE

I, do hereby certify that a true copy of the foregoing was mailed this day, postage prepaid, to Harvey A. Schwartz, Schwartz, Shaw & Griffith, 205 Portland Street, Boston, MA 02114, attorney for the Plaintiff.

/s/ Bernadette L. Sabra
Bernadette L. Sabra

SCHWARTZ, SHAW & GRIFFITH
 205 PORTLAND STREET
 BOSTON, MA 02114
 (617) 227-2414
 FAX (617) 227-1842

FACSIMILE TRANSMISSION

DATE: April 5, 1993

TO: Stephen C. Fulton FAX NO.: 439-3153
 TO: Bruce Assad FAX NO.: 508 674-5622
 TO: Robert Marchand FAX NO.: 508 677-4870
 TO: FAX NO.:
 TO: FAX NO.:
 FROM: Harvey A. Schwartz
 Schwartz, Shaw & Griffith

RE: Janet Scott-Harris v. City of Fall River

NO. OF PAGES INCLUDING TRANSMITTAL PAGE: 1

COMMENTS OR INSTRUCTIONS:

Gentlemen:

Here is the dismissal I propose to file at the pretrial conference Thursday. We can all sign at the deposition Wednesday.

Harvey A. Schwartz

UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS)

Plaintiff)

v.)

CITY OF FALL RIVER,
 MASSACHUSETTS; et al.)

Defendants)

CA NO.
 91-12057 WD

VOLUNTARY DISMISSAL

The parties hereby stipulate that all counts against the following defendants shall be dismissed with prejudice and without costs:

JOHN ALBERTO, individually and in his official capacity as a member of the Fall River City Council; JOHN MITCHELL, individually and in his official capacity as a member of the Fall River City Council; LEO PELLITIER, individually and in his official capacity as a member of the Fall River City Council; and MICHAEL PLASSKI, individually and in his official capacity as a member of the Fall River City Council.

Janet Scott-Harris, plaintiff
 By her attorneys,

HARVEY A. SCHWARTZ
 Schwartz, Shaw & Griffith
 205 Portland Street
 Boston, Massachusetts
 02114
 (617) 227-2414
 BBO # 448080

City of Fall River and all
defendants in their official
capacities By their attor-
neys,

Stephen C. Fulton
Long, Raicot & Bourgois
200 State Street
Boston MA 02109

Defendant Daniel Bogan
By his attorneys,

Robert Marchand
Driscoll, Marchand
& Boyer
206 Winter Street
PO Box 2527
Fall River MA 02722

Defendants Roderick, Connors, Alberto,
Pelletier and Plassakis in their individual capacities,
By their attorneys,

Bruce Assad
10 Purchase Street
Fall River MA 02720

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS)

Plaintiff)

v.)

CITY OF FALL RIVER,
MASSACHUSETTS; et al.)

Defendants)

CA NO.

91-12057 WD

VOLUNTARY DISMISSAL

The parties hereby stipulate that all counts against
the following defendants shall be dismissed with preju-
dice and without costs:

JOHN ALBERTO, individually and in his official
capacity as a member of the Fall River City
Council; JOHN MITCHELL, individually and in
his official capacity as a member of the Fall
River City Council; LEO PELLITIER, individu-
ally and in his official capacity as a member of
the Fall River City Council; and MICHAEL
PLASSKI, individually and in his official capac-
ity as a member of the Fall River City Council.

Janet Scott-Harris, plaintiff
By her attorneys,

/s/ Harvey A. Schwartz
HARVEY A. SCHWARTZ
Schwartz, Shaw & Griffith
205 Portland Street
Boston, Massachusetts
02114
(617) 227-2414
BBO # 448080

City of Fall River and all
defendants in their official
capacities By their attor-
neys,

/s/ Stephen C. Fulton
Stephen C. Fulton
Long, Raicot
& Bourgois
200 State Street
Boston MA 02109

/s/ Robert Marchand
Robert Marchand
Driscoll, Marchand
& Boyer
206 Winter Street
PO Box 2527
Fall River MA 02722

Defendants Roderick, Connors, Alberto,
Pelletier and Plassakis in their individual capacities,
By their attorneys,

/s/ Bruce Assad
Bruce Assad
10 Purchase Street
Fall River MA 02720

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 91-12057-WD

JANET SCOTT-HARRIS,

Plaintiff

vs.

CITY OF FALL RIVER,
Massachusetts; DANIEL E.
BOGAN, individually and in his
former official capacity as Mayor
of the City of Fall River, ROBERT
L. CONNORS, as Administrator
of the City of Fall River,
Massachusetts; MARILYN
RODERICK, individually and in
her official capacity as a member
of the Fall River City Council,

Defendants

MOTION TO
DISMISS

Now comes the Defendant, Daniel E. Bogan, and
moves this Honorable Court to Dismiss Counts I and II
against him individually and gives as his reasons that
during all times material, he was exercising his duties as
Mayor of the City of Fall River and was, thus, entitled to
absolute immunity for those acts.

Respectfully submitted,

DANIEL E. BOGAN, Defendant
By his attorney,

By: /s/ Robert J. Marchand
 Robert J. Marchand,
 Esquire
 DRISCOLL,
 MARCHAND & BOYER
 206 Winter Street,
 P.O. Box 2527
 Fall River, MA 02722
 (508) 672-8652
 DATED: May 3, 1994

[5/16/94 Denied as untimely.
 Patti B. Saris]

UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF MASSACHUSETTS

C.A. NO. 91-12057

JANET SCOTT-HARRIS,)
 Plaintiff)
 vs.)
 CITY OF FALL RIVER,)
 MASSACHUSETTS; DANIEL E.)
 BOGAN, individually and in his)
 former official capacity as Mayor)
 of the City Administrator of the)
 City of Fall River, Massachusetts;)
 ROBERT L. CONNORS,)
 individually and in his official)
 capacity as a member of the Fall)
 River City Council; MARILYN)
 RODERICK, individually and in)
 her official capacity as a member)
 of the Fall River City Council;)
 Defendants)

MOTION TO DISMISS

Now comes the Defendant, Marilyn Roderick, and moves this Honorable Court dismiss the above action on the grounds that said Complaint fails to state a claim against the Defendant, Marilyn Roderick, upon which relief may be granted.

Respectfully submitted,

/s/ Bruce A. Assad
 Bruce A. Assad, Esquire
 10 Purchase Street
 P.O. Box 1268
 Fall River, MA 02722-1268
 (508) 673-2004

/s/ Stephen C. Fulton
 Stephen C. Fulton, Esquire
 Long, Racicot & Bourgeois
 200 State Street
 Boston, MA 02109
 (617) 439-4777

DATED: May 4, 1994

[5/16/94 Denied as untimely.
 Patti B. Saris]

UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF MASSACHUSETTS

C.A. NO. 91-12057

JANET SCOTT-HARRIS,)
 Plaintiff)

vs.)

CITY OF FALL RIVER,)
 MASSACHUSETTS; DANIEL E.)
 BOGAN, individually and in his)
 former official capacity as Mayor)
 of the City Administrator of the)
 City of Fall River, Massachusetts;)
 ROBERT L. CONNORS,)
 individually and in his official)
 capacity as a member of the Fall)
 River City Council; MARILYN)
 RODERICK, individually and in)
 her official capacity as a member)
 of the Fall River City Council;)

Defendants)

MEMORANDUM IN SUPPORT OF DEFENDANT,
 MARILYN RODERICK'S MOTION TO DISMISS

Now comes the Defendant, Marilyn Roderick, and moves this Honorable Court dismiss the above action on the grounds that said Complaint fails to state a claim against the Defendant, Marilyn Roderick, upon which relief may be granted.

Defendant, Marilyn Roderick, both individually and in her official capacity as a City Councillor is entitled to

absolute immunity from federal damage claims including Section 1983 Title 42, U.S. Code actions for conduct undertaken in her legislative capacity.

(*Hogan v. South Lebanon* 596 NE 2d 1092 (Ohio App 12 Dist 1991); *Cutting v. Muzzey* 724 F2d 259 (1984); *Haskell v. Washington Twp.* (C.A. 6, 1988) 864 F2d 1266, 1277; *Healy v. Town of Pembroke Park* (C.A. 11, 1987) 831 F2d 989, 993; *Gorman Towers Inc. v. Bogoslavsky* (C.A. 8, 1980), 626 F2d 607, 611-613. *Tenney v. Brandhove* (1951) 341 U.S. 367, 71 S. Ct. 783, 95 L.Ed. 1019 *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency* 440 U.S. 391, 99 S. Ct. 1171, 59 L.Ed. 2d 401 (1979); *Latino Political Action Committee Inc. v. City of Boston* 581 F. Supp. 478.

The Defendant, Marilyn Roderick, voted, in her legislative capacity as a City Councillor, to amend the Ordinance establishing the said Department of Health and Human Services. Significantly, five other members of the City Council representing a majority vote, notwithstanding the vote of the defendant Marilyn Roderick, voted to amend said Ordinance, thereby eliminating the Department of Health and Human Services including the position of Administrator of Health and Human Services as part of a restructuring of city government.

The Plaintiff, Janet Scott-Harris, alleges that her right to equal protection of the laws, as protected by the 14th Amendment, was violated by the elimination of her position and the termination of her employment, in violation of 42 U.S.C. Section 1983.

The elimination of the Department of Health and Human Services as a part of a restructuring of city government was a **legislative** process accomplished in accordance with the Revised Ordinances of the City of Fall River.

The Department of Health and Human Resources was legislatively established by Ordinance and therefore could only be eliminated by Ordinance.

Pursuant to the Charter of the City of Fall River, Article II, Sections 18, 20 and 21, a majority of all members of the city council shall be necessary to adopt any ordinance. Dispositively, no ordinance shall be amended or repealed except by an ordinance adopted in accordance with the chapter. Every ordinance adopted by the City Council shall be presented to the Mayor for his approval. If he approves it, said ordinance shall be in force. If he disapproves said ordinance, the City Council must pass said ordinance by two-thirds ($\frac{2}{3}$ rds) vote of all its members to be in force.

The Defendant, Marilyn Roderick, acting in her capacity as a City Councillor performing her legislative function is entitled to absolute immunity.

State legislators are absolutely immune from suit for actions taken pursuant to their legislative activity. *Tenney v. Brandhove*, 71 S.Ct. 783, 341 U.S. 367 (1951). Legislative immunity is absolute because

"The privilege would be of little value if they could be subjected to the cost and inconvenience and distraction of a trial upon a conclusion of the pleading, or to the hazard of a judgment

against them based upon a jury's speculation as to Motives." *Id.* at 788.

Essentially absolute immunity is provided to legislative activities so that individual legislators will not feel hindered in the performance of their function.

The Supreme Court's holding in *Tenney* has been extended to non-elected officials of a regional planning agency. *Lake Country Estates, Inc. v. Tahoe Reg-Plan*, 99 S.Ct. 1171, 440 U.S. 391 (1979). The Court felt that the same reasoning used to apply absolute immunity to state legislators also applied to regional legislators. *Id.* at 1179.

Finally absolute immunity has been applied to local legislators. *Latino Political Action Com. v. City of Boston*, 581 F. Supp. 478 (1984). The Court in *Latino Political Action Committee* again found the arguments applying absolute immunity to state and regional legislators equally persuasive for local legislators. *Id.* at 482. The Court stated:

"Certainly the threat of suit is as likely to inhibit a Boston City Councillor's decision making as it is to inhibit that of a state or regional legislator." *Id.*

Other Courts which have addressed the issue have extended Absolute Immunity to local legislators acting in their legislative capacities. See *Baker v. Mayor and City Council of Baltimore*, 894 F.2d [sic] 679 (4th Cir. 1990) *Rateree v. Rockett*, 852 F.2d 946 (7th Cir. 1988) and *Finch v. City of Vernon*, 877 F. 2d 1497 (11th Cir. 1989).

The Court in *Rateree*, supra, held that the action of a City Council in eliminating a position entirely was not administrative but was legislative and that the City

Councilors were entitled to absolute immunity. *Rateree*, at 950. The Court stated:

"Employment decisions are not administrative when accomplished through traditional legislative function. They are not 'employment decisions' at all but instead, legislative, public policy choices that necessarily impact on the employment policies of the governing body. The political decision making inevitably involved in exercising budgetary restraint strikes at the heart of the legislative process and is protected legislative conduct." *Id.*

It is clear from the foregoing that a local legislator who votes to eliminate a position for budgetary reasons is acting in a legislative capacity and is absolutely immune from suit.

In the case at bar, Marilyn Roderick is a local legislator. She is a duly elected member of the Fall River City Council. Plaintiff's only allegation of wrongdoing against the Defendant is that she voted in favor of the Ordinance eliminating the Department of Health and Human Services which included the position of Administrator of Health and Human Services.

The elimination of the Department of Health and Human Services was done to reduce the operating budget for the City of Fall River. One of the affects of this Ordinance was the elimination of Plaintiff's position as the Administrator of Health and Human Services.

The ordinance passed by the City of Fall River City Council was proposed and passed in furtherance of its normal and legitimate legislative activities. Further, Defendant's action of voting in favor of an ordinance,

which had the effect of eliminating Plaintiff's position, is a purely legislative function and was performed exclusively in her capacity as a member of the City Council. Therefore the Defendant, Marilyn Roderick, is entitled to absolute immunity from suit.

CONCLUSION

Defendant, Marilyn Roderick, is a member of the Fall River City Council. As such she is accorded absolute immunity from suit for her legislative activities. Plaintiff's allegation of wrongdoing against the Defendant, Marilyn Roderick, is that she voted in favor a resolution eliminating the position of Administrator Health and Human Services. Said Ordinance was proposed and passed in furtherance of the City Council's normal and legitimate legislative activities. Defendant's action of voting in favor of said Ordinance was a purely legislative function performed exclusively in her capacity as a member of the City Council. Therefore Defendant, Marilyn Roderick, is absolutely immune from suit and Plaintiff's Complaint should be dismissed as it relates to the Defendant, Marilyn Roderick.

WHEREFORE, the Defendant, Marilyn Roderick, requests this Honorable Court dismiss this action against the Defendant, Marilyn Roderick with costs and applicable attorney's fees.

Respectfully submitted,

/s/ Bruce A. Assad
 Bruce A. Assad, Esquire
 10 Purchase Street
 P.O. Box 1268
 Fall River, MA 02722-1268
 (508) 673-2004
 BBO #022980

/s/ Stephen C. Fulton
 Stephen C. Fulton, Esquire
 Long, Racicot & Bourgeois
 200 State Street
 Boston, MA 02109
 (617) 439-4777

DATED: May 4, 1994

[Chartered and Related Laws –
Fall River Revised Ordinances]

* * *

In each city adopting any plan provided for by this chapter, the municipal year shall begin and end at ten o'clock in the morning of the first Monday of January in each year.

(Acts of 1915, c. 267, I, § 15; Acts of 1922, c. 237, § 3; Acts of 1933, c. 313, § 7; Acts of 1938, c. 378, § 5; Acts of 1941, c. 640, § 3)

Sec. 16. No primaries or caucuses to be held.

No primary or caucus for municipal officers shall be held, except in a city under Plan F. Candidates for mayor, city council and school committee, and assessors, if elected by the people, shall, except in a city under Plan F, be nominated in accordance with section six of chapter fifty-three.

(Acts of 1959, c. 448, § 5, approved Aug. 10, 1959; effective 90 days thereafter)

Sec. 16A. Conduct of city primary and election under Plan F.

Editor's note – This section was not printed herein as the city elected the Plan A form of government.

Sec. 17. Certain officials to be sworn, time, etc.

On the first Monday in January following a regular municipal election, at ten o'clock in the forenoon, the mayor-elect if elected by the people, the councillors-elect, and the assessors-elect if elected by the people, shall meet and be sworn to the faithful discharge of their duties. The

oath may be administered by the city clerk or by a justice of the peace, and a certificate thereof shall be entered in the journal of the city council. At any regular council meeting thereafter the oath may be administered in the presence of the city council to the mayor, or to any councillor absent from the meeting on the first Monday in January; provided, that under Plan E, the oath may be so administered to the mayor and vice-chairman at the same meeting at which they are respectively elected.

(Acts of 1915, c. 267, I, § 17; Acts of 1916, c. 68, § 2; Acts of 1922, c. 237, § 4; Acts of 1938, c. 378, § 6)

Sec. 17A. Salaries of mayor, city manager and council.

The mayor or city manager and the members of the city council shall receive for their services such salary as the city council shall by ordinance determine, and they shall receive no other compensation from the city, except that a member of a town council in a municipality with a town council form of government may receive a salary for serving as a municipal employee of said municipality in lieu of receiving compensation for serving as a member of said council. No increase or reduction in the salaries of mayor or city councillors shall take effect during the year in which such increase or reduction is voted, and no change in such salaries shall be made between the election of a new council and the qualification of the new council. The provisions of this section shall not be applicable in a city under Plan F.

(Acts of 1952, c. 259, § 2; Acts of 1958, c. 72, § 2; c. 513, § 2; Acts of 1959, c. 448, § 7, approved Aug. 10, 1959; effective

90 days thereafter; Acts of 1963, c. 731, § 1, approved October 1, 1963; Acts of 1985, c. 252, § 2)

Sec. 17B. Compensation of mayor and council members of Plan F cities.

Editor's note – This section was not present herein as the city elected the Plan A form of government.

Sec. 17C. Four-year term for mayors in certain cities; acceptance by election; application of section.

Editor's note – This section was not present herein as the city elected Sec. 17D, two-year term for mayors.

Sec. 17D. Two-year term for mayors in cities under section 17C; acceptance by election.

In any city in which the term of office of mayor is four years under the provisions of section seventeen C, upon the filing with the city clerk of a petition, which petition shall be subject to the provisions of section seven or section seven A of chapter fifty-three, signed by at least five per cent of the number of registered voters residing in said city at the last regular city election, the city clerk shall place upon the ballot for the next regular city election to be held not less than sixty days after the date of the filing of such petition the following question:

"Shall the term of office of mayor of the city of
— be two years?"

YES. _____

NO. _____

If a majority of the votes cast in answer to said question is in the affirmative, the term of office of the mayor of said city shall thereafter be for two years and until the election and qualification of his successor, beginning with the next regular city election following the acceptance of this question.

(Acts of 1971, c. 311)

Editor's note – In a referendum held on November 6, 1973, the city voted to adopt a two-year term for mayors.

Case law reference – Procedures for referendum on question of two-year term of office for mayor under section 17C and section 17D of this chapter applicable to City of Fall River which had adopted a Plan A form of government, *Medeiros Board of Election Commissioners of Fall River*, 325, N.E. 2d 579, 367 Mass. 286 (1975).

Sec. 18. Legislative powers, proceedings, city clerk, etc.

Except as otherwise provided in this section, the legislative powers of the city council may be exercised as provided by ordinance or rule adopted by it.

1. *Quorum, etc.* – Every member of the council may vote on any question coming before it. A majority of the council shall constitute a quorum, and the affirmative vote of a majority of all the members of the council shall be necessary to adopt any motion, resolution or ordinance.
2. *Proceedings, etc.* – The city council shall, from time to time, establish rules for its proceedings. Regular and special meetings of the

council shall be held at a time and place fixed by ordinance. Except as otherwise authorized by section twenty-three A of Chapter thirty-nine, all sessions of the council shall be open to the public and to the press, and every matter coming before the council for action shall be put to a vote, the result of which shall be duly recorded. A full and accurate journal of the proceedings of the council shall be kept, and shall be open to the inspection of any registered voter of the city.

3. *City Clerk, Election, etc.* - The council shall, by a majority vote, elect a city clerk to hold office for three years and until his successor is qualified. He shall have such powers and perform such duties as the council may prescribe, in addition to such duties as may be prescribed by law. He shall keep the records of the meetings of the council.

City Clerk to Hold Office Until Successor Is Qualified. - The person holding the office of the city clerk at the time when any of the plans set forth in this chapter have been adopted by such city shall continue to hold office for the term for which he was elected and until his successor is qualified.

4. *City Auditor.* - The council in any city adopting Plan D or E shall, by a majority vote, elect a city auditor to hold office for three years and until his successor is qualified. He shall keep and have charge of the accounts of the city and from time to time audit the books and accounts of all departments, commissions, boards and offices of the city, and shall have such other powers and perform

such other duties as the council may prescribe, in addition to such duties as may be prescribed by law. (Acts of 1915, c. 267, I, § 18; Acts of 1938, c. 378 § 7; Acts of 1949, c. 723, § 1, Acts of 1958, c. 626, § 5)

Sec. 19. Information by mayor or city manager to city council, attendance at meetings, etc.

The city council at any time may request from the mayor, or, under Plan D or E, from the city manager, specific information on any municipal matter within its jurisdiction, and may request him to present to answer written questions relating thereto at a meeting to be held not earlier than one week from the date of the receipt by the mayor, or under Plan D or E, by the city manager, of said questions. The mayor, or, under Plan D or E, the city manager, shall personally, or through the head of a department or a member of a board, attend such meeting and publicly answer all such questions. The person so attending shall not be obliged to answer questions relating to any other matter. The mayor, or, under Plan D or E, the city manager, may attend and address the city council in person or through the head of a department, or a member of a board, upon any subject. (Acts of 1915, c. 257, I, § 19; Acts of 1938, c. 378, § 8; Acts of 1948, c. 459, § 6)

Sec. 20. Ordinances, passage, etc.

No ordinance shall be passed finally on the date on which it is introduced, except in cases of special emergency involved the health or safety of the people or their property.

No ordinance shall be regarded as an emergency measure unless the emergency is defined and declared in a preamble thereto separately voted on and receiving the affirmative vote of two thirds of the members of the city council.

No ordinance making a grant, renewal or extension, whatever its kind or nature, of any franchise or special privilege shall be passed as an emergency measure, and except as provided in sections seventy and seventy-one of chapter one hundred and sixty-four and in chapter one hundred and sixty-six, no such grant, renewal or extension shall be made otherwise than by ordinance.

(Acts of 1915, c. 267, I, § 20)

Sec. 21. Amendments, etc.

No ordinance shall be amended or repealed except by an ordinance adopted in accordance with this chapter.

(Acts of 1915, c. 267, I, § 21)

Sec. 22. Passage at one session.

Any ordinance, order or resolution may be passed through all its stages of legislation at one session, provided that no member of the council objects thereto; but if any member of the council objects, the measure shall be postponed for that meeting.

(Acts of 1915, c. 267, I, § 22)

Sec. 23. Ordinances, etc., to be published.

Every proposed ordinance or loan order, except emergency measures as hereinbefore defined and revenue loan orders, shall be published once in full in at least one newspaper of the city, and in any additional manner that may be provided by ordinance, at least ten days before its final passage. After such final passage it shall, in the same manner as before, again be published once, as amended and completed, except in the case of an emergency ordinance which may be passed as hereinbefore provided and which shall take effect on its passage, and shall be so published at the earliest practicable moment; provided, that if any ordinance or proposed ordinance, or codification of ordinances or proposed ordinances, shall exceed in length eight octavo pages of ordinary book print, then, in lieu of the advertising required by this section, the same may be published by the city council in a municipal bulletin or printed pamphlet, and if so published in full at least ten days before its final passage, and thereafter, as amended and completed, again published in such bulletin or pamphlet, said publications shall be deemed sufficient without the newspaper publication as herein required.

(Acts of 1915, c. 267, I, § 23; Acts of 1917, c. 162; Acts of 1935, c. 68, § 1)

Sec. 24. Obligations, actions, legal acts, etc., to continue.

All official bonds, recognizances, obligations, contracts and other instruments entered into or executed by or to the city before its adoption of a plan provided by

this chapter, and all taxes, special assessments, fines, penalties, forfeitures incurred or imposed, due or owing to the city, shall be enforced and collected, and all writs, prosecutions, actions and causes of action, except as herein otherwise provided, shall continue without abatement and remain unaffected by this chapter; and no legal act done by or in favor of the city shall be rendered invalid by its adoption of a plan provided by this chapter.

(Acts of 1915, c. 267, I, § 24)

Sec. 25. Civil service laws not to apply to certain employees.

The civil service laws shall not apply to the appointment of the mayor's secretaries or of the stenographers, clerks, telephone operators and messengers connected with his office, and the mayor may remove such appointees without a hearing and without making a statement of the cause of their removal.

(Acts of 1915, c. 267, I, § 25)

Sec. 26. Certain vacancies, how filled; acting mayor.

Except as otherwise provided in sections fifty A, fifty-nine A, eight-six, one hundred and two and one hundred and twenty-one, if a vacancy occurs in the office of the mayor or city council before the last six months of the term of office, the city council shall order an election for a mayor or a member of the council to serve for the unexpired term; and if such vacancy occurs in the office of mayor in the last six months of the term, the president of the city council shall succeed to said office for the

unexpired term. If the mayor is absent or unable from any cause temporarily to perform his duties they shall be performed by the president of the city council. The person upon whom such duties shall devolve shall be called "acting mayor," and he shall possess the powers of mayor only in matters not admitting of delay, but shall have no power to make permanent appointments.

Whenever, under Plan C, any councillor shall be temporarily unable for any cause to perform the duties of his office, the council may appoint one of its members to exercise his powers and perform his duties during such disability. Should an appointive officer of the city be temporarily unable for any cause to perform his duties, the council or the mayor, having the power of original appointment, may make a temporary appointment of some person to act until such official resumes his duties.

(Acts of 1915, c. 267, I, § 26; Acts of 1937, c. 224, § 1; Acts of 1938, c. 378, § 9; Acts of 1959, c. 448, § 9)

Sec. 27. Officials and employees prohibited from making or sharing in contracts; penalty.

Editor's note - Chapter 600 of the Acts of 1947 replaced this section of the Charter. The city then adopted M.G.L.A. c. 268, § 10, which was repealed by Acts of 1962, c. 779 and replaced by M.G.L.A., c. 268A, § 1 et seq.

Sec. 28. Repealed.

Editor's note - This section was repealed by Acts of 1984, c. 484, § 42.

Sec. 29. Public contracts; form; required approvals; bond, etc.

All contracts made by any department, board or commission where the amount involved is two thousand dollars or more shall be in writing, and no such contract shall be deemed to have been made or executed until the approval of the mayor under Plan A, B, C or F, or of the city manager under Plan D or E, and also of the officer or the head of the department or of the chairman of the board, as the case may be, making the contract is affixed thereto. Any contract made as aforesaid may be required to be accompanied by a bond with sureties satisfactory to the board or official having the matter in charge, or by a deposit of money, certified check or other security for the faithful performance thereof, and such bonds or other securities shall be deposited with the city treasurer until the contract has been carried out in all respects; and no such contract shall be altered except by a written agreement of the contractor, the sureties on his bond, if any, and the officer, department or board, as the case may be, making the contract, with the approval of the mayor under Plan A, B, C, D or F, or of the city manager under Plan E, affixed thereto. Any cash deposit or check payable to a city received as security for performance under this section may be deposited by said treasurer in any bank or trust company under a separate account to be known as a performance deposit account.

The provisions of this section shall be deemed to have been complied with on all purchases made under the provisions of sections twenty-two A and twenty-two B of chapter seven when one municipality acting on

behalf of other municipalities complies with the provisions of this section, or when purchases are made from a vendor holding a contract with the commonwealth for the item or items being purchased.

(Acts of 1915, c. 267, I, § 29; Acts of 1928, c. 300, § 2; Acts of 1938, c. 378, § 10; Acts of 1949, c. 723, § 2; Acts of 1951, c. 25, § 2; Acts of 1959, c. 448, § 10, approved Aug. 10, 1959; effective 90 days thereafter; Acts of 1973, c. 191; Acts of 1974, c. 199, § 3)

* * *

out a hearing and without making a statement of the cause of the removal.

(Rev. Ords. 1966, § 2-1; Ord. No. 1983-7, 2-8-83)

Charter reference – Civil service laws shall not apply to certain employees in mayor's office, § 25.

Cross reference – Officers and employees, § 2-266 et seq.

Sec. 2-148. City administrator.

(a) There shall be an officer within the executive office of the mayor to be known as the city administrator.

(b) The city administrator shall be appointed by the mayor and shall be employed by contract. The city council shall approve the contract.

(c) The city administrator shall, under the direction of the mayor, assist the mayor in the administration of all affairs of the city that are placed in the mayor's charge by

the provisions of the city charter and ordinances, and by statutes of the commonwealth.

(d) The city administrator shall have the following minimum qualifications: either a bachelor's degree in business, political science, government, or related fields from an accredited institution and seven (7) years' experience in federal, state or local government; of which five (5) years were served in an administrative capacity; or a master's degree in public administration or related fields and five (5) years' experience in federal, state or local government, of which three (3) years were served in an administrative capacity. (Rev. Ords. 1966, § 2-1.1; Ord. No. 1983-7, 2-8-83; Ord. No. 1984-35, § 1, 9-25-84)

Cross reference – Officers and employees, § 2-266 et seq.

Sec. 2-149. Director of management information services.

(a) There shall be an officer within the office of the mayor to be known as the director of management information services.

(b) The director of management information services shall be appointed by the mayor and shall be employed by contract. The city council shall approve the contract.

(c) The director of management information services shall, under the direction of the city administrator, assist the city administrator with affairs of the city dealing with the management of information services. These include, but are not limited to, administration of the city's

data-processing and computer-related services, administration of printed communications services and telephonic communication services.

(Rev. Ords. 1966, § 2-1.2; Ord. No. 1986-38, § 1, 10-14-86)

Cross reference – Officers and employees, § 2-266 et seq.

Secs. 2-150-2-165. Reserved.

ARTICLE IV. BOARDS, COMMITTEES, COMMISSIONS*

DIVISION 1. GENERALLY

Secs. 2-166-2-176. Reserved.

DIVISION 2. AIRPORT COMMISSION†

***Charter references** – School committee, §§ 31-36; appointment of certain board members by the mayor, § 52; removal by mayor, § 54.

Cross references – Board of public works created, § 2-501 et seq.; civil defense advisory counsel, § 5-3; board of fire commissioners, § 6-31 et seq.; port authority, § 8-16 et seq.; board of health, § 9-31 et seq.; historical commission, § 10-16 et seq.; advisory housing commission, § 11-71 et seq.; board of appeals, § 11-86 et seq.; housing conversion board created, § 11-141; licensing board, § 12-21 et seq.; board of park commissioners, § 15-26 et seq.; personnel advisory board, § 16-31 et seq.; school committee, § 17-16 et seq.; library board of trustees, § 18-341 et seq.; City of Fall River Sewer Commission, § 19-26 et seq.; Watuppa Water Board, § 19-196 et seq.; board of appeals, § 21-36.

†State law references – Aircraft generally, M.G.L.A., c. 90, § 35 et seq.; authority of city to establish, maintain and operate airports and air navigation facilities, M.G.L.A.C. 90, § 51D; authority of city to establish airport commission, M.G.L.A., c.

Sec. 2-177. Established; composition; appointment of members.

There is hereby established in the city a commission of seven (7) members consisting of a chairman and six (6) associate members, citizens of the city, to be appointed by the mayor, approved by the council, and to be known as the Fall River Airport Commission.

(Rev. Ords. 1966, § 3-1)

State law reference – Similar provision, M.G.L.A., c. 90, § 51E.

Sec. 2-178. Powers and duties generally.

The airport commission shall have charge of the development and improvement of airport facilities for the city and may make such recommendations as it sees fit to the city council for the development of the present airport site now held by the city or for the acquiring of a new and different airport site.

(Rev. Ords. 1966, § 3-2)

State law reference – Powers and duties, M.G.L.A., c. 90, § 51F et seq.

Sec. 2-179. Additional powers.

The airport commission shall be granted whatever other powers that may be necessary, even though not

90, § 51E; powers and duties of airport commission, M.G.L.A., c. 90, §§ 51E to 51L.

expressly designated herein, to carry out the purpose of this division.

(Rev. Ords. 1966, § 3-6)

Sec. 2-180. Clerk and clerical assistance.

(a) One (1) of the members shall annually be appointed clerk of the airport commission.

(b) The department of recreational facilities and cemeteries shall provide such administrative, clerical and management support as is requested by the airport commission. The commission shall reimburse the department of recreational facilities and cemeteries for such assistance.

(Rev. Ords. 1966, § 3-3; Ord. No. 1983-12, § 3, 5-17-83)

Sec. 2-181. Expenditure of funds.

The airport commission is authorized to spend whatever money is made available by the city council for airport purposes.

(Rev. Ords. 1966, § 3-4)

Sec. 2-182. Promotion of air transport service; authority to enter into contracts.

The airport commission shall use all means at its disposal for the purpose of promoting the introduction of air transport service into and out of the city and for that purpose is hereby authorized, subject to the approval of the mayor, to enter into any and all contracts with private

individuals and corporations that may be necessary for the establishment of such service in the city.

(Rev. Ords. 1966, § 3-5)

State law references - Disposition of revenue obtained by airport commission, M.G.L.A., c. 90, § 51I; contracts for establishment, etc., of municipal airports or other air navigation facilities, M.G.L.A., c. 90, § 51L.

Secs. 2-183-2-193. Reserved.

DIVISION 3. BOARD OF ASSESSORS*

Sec. 2-194. Membership.

The board of assessors shall consist of three (3) members appointed by the mayor.

Sec. 2-195. Organization; quorum.

The board of assessors shall annually, organize and choose from their number a chairman and secretary. A majority of the board shall be a quorum for the transaction of business.

(Rev. Ords. 1966, § 2-120)

***Charter reference** - Provisions regarding oaths of elected assessors, § 17.

Cross reference - Public property, § 2-746 et seq.

State law references - Assessors generally, M.G.L.A., c. 41, §§ 24-30A; assessment of local taxes generally, M.G.L.A., c. 59; duty to assess and manner of assessing taxes, M.G.L.A., c. 59, §§ 20-28.

Sec. 2-196. In charge of assessing department; powers and duties generally.

(a) The assessing department shall be under the charge of the board of assessors which shall have and exercise all the powers and duties, and be subject to all limitations, of assessors of property. In addition, the board of assessors shall have charge and custody of all of the real estate owned or acquired by the city as a result of foreclosure of tax titles, or which the city council may from time to time hereafter specifically commit to its care.

(b) The board of assessors may assign any of its powers or duties, with reference to such real estate in its care and custody, to any properly qualified employee of the assessing department. The powers and duties of the board of assessors, with

* * *

ARTICLE VI. DEPARTMENTS*

DIVISION 1. GENERALLY

Secs. 2-431-2-440. Reserved.

DIVISION 2. DEPARTMENT OF HEALTH AND HUMAN SERVICES†

***Cross references** - Division of council on aging in the department of health and human services created, § 2-235; purchasing and contracting procedure, § 2-586 et seq.; purchasing department, § 2-596 et seq.; department of civil defense, § 5-1; fire department, § 6-16 et seq.; bureau of fire prevention, § 6-51 et seq.; division of public health created, § 9-16; traffic department, § 14-56 et seq.

†**Cross-references** - Division of the council on aging of the health and human services created, § 2-235; housing standards, § 11-36 et seq.

Sec. 2-441. Created; administrator.

There shall be a department of the city known as the department of health and human services. There shall be an administrator of health and human services who shall be appointed by the mayor and who shall have and exercise all the powers, rights and privileges required to supervise and control the department, except when specifically prohibited by state law.

(Ord. No. 1987-2, § 10E(13-1), 1-13-87)

Sec. 2-442. Composition.

The divisions of the department of health and human services are the division of administration, division of council on aging, division of code enforcement, division of public health, and a division of veteran's affairs.

(Ord. No. 1987-2, § 10E(13-1), 1-13-87; Ord. No. 1988-10, § 1, 2-23-88; Ord. No. 1988-25, § 5, 5-31-88)

Sec. 2-443. Division directors, appointment.

The directors of the divisions in the department of health and human services shall be appointed by the administrator of health and human services with the approval of the mayor, unless where specifically prohibited by state statute.

(Ord. No. 1987-2, § 10E(13-1), 1-13-87)

Sec. 2-444. Director of code enforcement powers and duties generally.

(a) The director of code enforcement shall also be designated inspector of buildings for the city and in his capacity as inspector of buildings, shall perform all repairs, alterations or additions upon all city buildings, including all buildings under the jurisdiction of the board of assessors, such repairs, alterations or additions to be performed in accordance with and subject to the provisions of this Revision and the general law. He shall also perform all other statutory duties as required by this designation.

(b) The director of code enforcement acting as building inspector will report to the administrator of health and human services. The director of code enforcement shall also exercise the powers and duties of inspector of wires as conferred under M.G.L.A., c. 166 and all others as conferred under chapter 7, as well as others which from time to time the mayor may direct.

(c) The director of code enforcement shall be designated as deputy health agent for the city.

(d) The director of code enforcement shall be appointed by the administrator of health and human services with the approval of the mayor and shall be subject to the administrative control, supervision and direction of the administrator, except when prohibited by state statute.

(Ord. No. 1987-2, § 10E(13-2), 1-13-87; Ord. No. 1988-25, § 5, 5-31-88)

Cross reference - Public property, § 2-746 et seq.

Sec. 2-445. Division of code enforcement – In charge of construction of public buildings.

The division of code enforcement shall have charge of the construction and maintenance of public buildings and related duties.

(Ord. No. 1987-2, § 10E(13-3), 1-13-87; Ord. No. 1988-25, § 5, 5-31-88)

Sec. 2-446. Same – Superintending construction of city buildings; making repairs, alterations or additions.

The division of code enforcement shall superintend the construction of all buildings erected by the city and shall perform all repairs, alterations or additions to all city buildings.

(Ord. No. 1987-2, § 10E(13-4), 1-13-87; Ord. No. 1988-25, § 5, 5-31-88)

Sec. 2-447. Same – Care and custody of city buildings.

The division of code enforcement shall have the care and custody of all city buildings used by the board of fire commissioners, the board of library trustees, the war veterans or their auxiliaries, and all other city buildings, except where other provision is made by law, and shall keep informed of their condition.

(Ord. No. 1987-2, § 10E(13-5), 1-13-87; Ord. No. 1988-25, § 5, 5-31-88)

Sec. 2-448. Same – New buildings for use of other departments.

It shall be the duty of the division of code enforcement to superintend the construction of all new buildings erected for the use of other departments, but no such new construction shall be started without first obtaining the approval of the appropriate board, commission, or department head to the plans and specifications relating to such proposed new building.

(Ord. No. 1987-2, § 10E(13-6), 1-13-87; Ord. No. 1988-25, § 5, 5-31-88)

Sec. 2-449. Same – Competitive bids for repairs, alterations, or additions to public buildings.

No repairs, alterations, or additions to any public building in the care or custody of the division of code enforcement shall be made without first advertising for competitive bids for the work to be done, as required by the ordinances of the city and as required by M.G.L.A., c. 43, § 28.

(Ord. No. 1987-2, § 10E(13-7), 1-13-87; Ord. No. 1988-25, § 5, 5-31-88)

Sec. 2-450. Same – Employing architectural and engineering services.

The division of code enforcement shall employ such architectural and engineering services necessary to perform the duties of the division as requested by the administrator of public works, the mayor, city council, the school committee, or by any board or officer in charge of a department of the city government.

(Ord. No. 1987-2, § 10E(13-8), 1-13-87; Ord. No. 1988-25, § 5, 5-31-88)

Sec. 2-451. Reserved.

Editor's note – Ord. No. 1988-25, § 6, adopted May 31, 1988, repealed provision formerly codified as § 2-451, relative to employment of certain tradesmen, which derived from Ord. No. 1987-2, § 10E(13-9), adopted Jan. 13, 1987.

Sec. 2-452. Same – Record of city buildings; annual reports.

The division of code enforcement shall keep an accurate record of all buildings belonging to the city which are in its charge and shall annually on or before the first Monday of February, submit to the administrator of health and human services, a written report showing their condition and the nature and amount of expenditures in detail made upon them for the year ending with the last day of December preceding. It shall also prepare as statement of the repairs which may be needed upon each building in the next twelve (12) months and the probable cost thereof.

(Ord. No. 1987-2, § 10E(13-10), 1-13-87; Ord. No. 1988-25, § 5-31-88)

Sec. 2-453. Same – Establishment of standards and codes and inspections relative thereto.

The division of code enforcement shall establish standards and codes for all construction or reconstruction

carried out within the city. It shall also conduct all inspection necessary to ascertain that its standards are met.

(Ord. No. 1987-2, § 10E(13-11), 1-13-87; Ord. No. 1988-25, § 5, 5-31-88)

Sec. 2-454. Same – Enforcement of ordinances, etc., relative to buildings.

The division of code enforcement shall enforce all ordinances, regulations and laws relating to buildings in the city, or the construction, alteration or repair thereof.

(Ord. No. 1987-2, § 10E(13-12), 1-13-87; Ord. No. 1988-25, § 5, 5-31-88)

Sec. 2-455. Same – Inspection of building materials and examination of buildings generally.

As often as is practicable, the division of code enforcement shall inspect the materials used in the construction or the repairing of any building. It shall also examine the construction of any building in the process of erection or repair and so far as necessary therefor may enter any building or premises. It shall examine all buildings which may be reported to it as in a dangerous or damaged condition by reason of fire, accident or other cause and shall make a record of such condition, together with the street and number of the building, the name of the owner or occupant and the purposes for which it was used. It shall examine all buildings concerning which application has been made for license to construct, enlarge, alter, repair or raze and shall make a record of such examination.

(Ord. No. 1987-2, § 10E(13-13), 1-13-87; Ord. No. 1988-25, § 5, 5-31-88)

Sec. 2-456. Same – Employment of inspectors.

The division of code enforcement shall employ inspectors in such numbers and of such expertise as to adequately conduct the business of the division in a good and timely fashion. There shall be an inspector of buildings and an inspector of wires and any others needed to properly enforce the provisions of section 11-36 et seq.

(Ord. No. 1987-2, § 10E(13-14), 1-13-87; Ord. No. 1988-25, § 5, 5-31-88)

Secs. 2-457-2-470. Reserved.

DIVISION 3. POLICE DEPARTMENT*

Sec. 2-471. Police department alarm system.

(a) The police department is hereby authorized to install, monitor and maintain a silent alarm system, providing silent or so-called holdup alarms to financial and mercantile institutions located in the city.

(b) The police department is further authorized to charge installation, monitoring and maintenance fees for

*Cross-reference – Police authorized to aid other cities in the event of riots, etc., § 5-4.

State law references – Police officers, M.G.L.A., c. 31, § 58 et seq.; municipal police officers generally, M.G.L.A., c. 41, § 96 et seq.; police generally, M.G.L.A., c. 147.

each such institution so connected at a rate agreed to by the participating business entities.

(c) The police department shall be permitted to add all such monies, so generated by providing this service, to its allotted annual budget as provided by the mayor and city council, for the sole purpose of acquiring needed material and resources to improve the delivery of public safety services to the community.

(Rev. Ords. 1966, § 2-118.1; Ord. No. 1982-28, 8-10-82)

Cross reference – Licenses, permits and business regulations, Ch. 12.

Secs. 2-472-2-486. Reserved.

**DIVISION 4. PUBLIC WORKS
DEPARTMENT†**

Subdivision A. Generally

Sec. 2-487. Created.

There shall be a department of the city known as the department of public works.

(Rev. Ords. 1966, § 2-129; Ord. No. 1981-28, § 1(2-129), 9-1-81)

†Cross references – Garbage, refuse and litter, Ch. 7; streets, sidewalks and other public places, Ch. 18; utilities, Ch. 19.

Sec. 2-488. Divisions within the department enumerated.

The divisions within the department of public works are the division of engineering, division of administrative services, division of solid waste operations, division of streets, yards and garages and division of municipal buildings.

(Rev. Ords. 1966, § 2-136; Ord. No. 1981-28, § 1(2-136), 9-1-81; Ord. No. 1987-2, § 10C(2-136), 1-13-87)

Editor's note – Pursuant to the adoption of § 6 of Ord. No. 1988-25, enacted May 31, 1988, the "division of municipal buildings" has been added to the enumeration of divisions within the department of public works. See Subdivision G of this division.

Sec. 2-489. Persons in charge of divisions.

Each division of the department of public works shall employ an individual who, under the immediate supervision of the administrator shall have charge of that division. The titles for each division and director shall be as follows:

- (1) Division of engineering; director of engineering (civil engineering);
- (2) Division of administrative services; director of administrative services;
- (3) Division of solid waste operations; director of solid waste operations;
- (4) Division of streets, yards and garages; director of streets, yards and garages.

(Rev. Ords. 1966, § 2-137; Ord. No. 1981-28, § 1(2-137), 9-1-81; Ord. No. 1983-8, § 2, 4-12-83; Ord. No. 1987-2, § 10C(2-137), 1-13-87)

Secs. 2-490-2-500. Reserved.

*Subdivision B. Board of Public Works**

Sec. 2-501. Appointment and removal.

The appointment, terms of office and removal of the members of the board of public works shall be as provided by Acts of 1980, Chapter 207.

(Rev. Ords. 1966, § 2-129.1; Ord. No. 1981-28, § 1(2-129.1(III)), 9-1-81; Ord. No. 1987-2, § 10C(2-129.1(III)), 1-13-87)

Sec. 2-502. Qualifications, compensation.

The board of public works shall consist of three (3) citizens of the city who have been residents therein at least two (2) years immediately preceding the date of their appointment. Board members shall serve without compensation.

(Rev. Ords. 1966, § 2-129.1; Ord. No. 1981-28, § 1(2-129.1), 9-1-81; Ord. No. 1987-2, § 10C(2-129.1(III)), 1-13-87)

*Cross reference – Boards, committees, commissions, § 2-166 et seq.

State law reference – Board of public works, Acts of 1980, c. 207.

Sec. 2-503. Powers, duties and responsibilities.

The board of public works shall serve solely in an advisory capacity to the administrator of public works and shall organize itself as it deems appropriate for the purpose of discharging its advisory functions. The board is hereby limited to performing the advisory functions as listed below:

- (1) Advise the administrator of public works on contracted and/or technical services;
- (2) Assist the administrator of public works in developing a strategic planning process for department operations;
- (3) Assist the administrator of public works in formulating capital improvement programs;
- (4) Advise, upon request, the administrator of public works with regard to the awarding of contracts for the purchase of service and/or material;
- (5) Advise the mayor regarding the appointment of the administrator of public works.

(Rev. Ords. 1966, § 2-129.1; Ord. No. 1981-28, § 1(2-129.1(IV)), 9-1-81; Ord. No. 1987-2, § 10C(2-129.1(IV)), 1-13-87)

Secs. 2-504-2-515. Reserved.*Subdivision C. Administrator of Public Works***Sec. 2-516. Established.**

There shall be an officer of the city known as the administrator of public works. The administrator of public works shall be responsible for the operation of the

department of public works and shall be considered a department head under M.G.L.A., c. 41, §§ 48-54A.

(Rev. Ords. 1966, § 2-129.2; Ord. No. 1981-28, § 1(2-130), 9-1-81; Ord. No. 1987-2, § 10C(2-129.2), 1-13-87)

Sec. 2-517. Appointment.

The mayor shall appoint the administrator of public works who shall be responsible for the operation of the department of public works.

(Rev. Ords. 1966, § 2-130; Ord. No. 1981-28, § 1(2-130), 9-1-81; Ord. No. 1987-2, § 10C(2-130), 1-13-87)

* * *

[LOGO] City of Fall River, Massachusetts

CHARLOTTE L. KITCHEN
CLERK OF COMMITTEES

RICHARD A. VASCONCELLOS
ASSISTANT CLERK OF COMMITTEE

March 1, 1991

Dear Councillor:

A meeting of the Committee on Ordinances has been scheduled for Tuesday, March 5, 1991 at 6:30 P.M. in the Council Chamber, Government Center to consider the following:

1. Misc. traffic ordinance
2. Handicapped Parking traffic ordinance
3. Proposed changes in city ordinances recommended by Personnel Director Sharon Skeels in her letter dated Feb. 21, 1991.

Your attendance at this meeting is respectfully requested.

Very truly yours,

/s/ Charlotte L. Kitchen
Charlotte L. Kitchen
Clerk of Committees

A TRUE COPY

ATTEST: /s/ Joseph F. Doran
CITY CLERK

Committee Members:

M. Roderick, chr.
S. Camara
J. Mitchell
L. Pelletier
M. Plasski

ORDINANCE MEETING

MEETING: Tuesday, March 5, 1991, 6:30 p.m.
Council Chamber, Government Center

PRESENT: Councillor Camara, Pelletier and Plasski
Councillor Roderick came in at 6:50 p.m.

ABSENT: Councillor J. Mitchell

IN ATTENDANCE: Charlene Simcock, Traffic Manager
Robert Connors, City Administrator
Sharon Skeels, Personnel Director

Councillor Steven Camara presided in the absence of Chairman Marilyn Roderick

After discussion on miscellaneous traffic ordinances a copy of which is attached it was voted to refer to full council for first reading, 3 yeas.

The proposed handicapped parking ordinance was discussed with Mrs. Simcock who explained that the proposed ordinance relative to Cherry Street contained an error and should not be considered at this time. The ordinance was then unanimously [sic] referred to full council to be passed with an emergency preamble through all four readings. City Councillor Roderick arrived and took over chairmanship of committee.

The Committee discussed the proposed ordinance relative to the Department of Health and Human Services with Personnel Director Sharon Skeels and City Administrator Robert Connors. Ms. Skeels told the Committee

that divisions presently under the Department of Health and Human Services would become departments with department heads reporting to the City Administrator and the Department of Heath [sic] and Human Services would be disbanded. The position of Administrator of Health and Human Services would be discontinued as of April 1, 1991 and it was stated that the present Administrator had been offered the position of Director of Public Health but had refused. It was voted unanimously to refer the ordinance to the full council for first reading (4 yeas), Councillor J. Mitchell absent.

On a motion made and seconded it was unanimously voted to adjourn.

/s/ Charlotte L. Kitchen
Clerk of Committees

[LOGO] *City of Fall River, Massachusetts*

DEPARTMENT OF PERSONNEL ADMINISTRATION
CIVIL SERVICE • LABOR RELATIONS
LOCATIONS • GROUP INSURANCE

DANIEL E. BOGAN
MAYOR

SHARON M. SKEELS
DIRECTOR OF PERSONNEL
ADMINISTRATION

February 21, 1991

Honorable Daniel E. Bogan
Mayor, City of Fall River
One Government Center
Fall River, MA 02722

Dear Mayor Bogan:

As directed by the City Administrator, I respectfully request your approval and recommendation to the City Council to revise certain section [sic] of the Ordinances of the City of Fall River to restructure the Health & Human Services Department as follows:

1. Delete the Health & Human Services Department as an entity.
2. Delete Division of Administration.
3. The following divisions of the former Health & Human Services Department shall revert to department status, with the department head reportable to the City Administrator:
 - a. Council on Aging
 - b. Veterans' Affairs
 - c. Public Health - to include the following inspectorial functions:

- 1) Minimum Housing
- 2) Sanitation
- 3) Food & Milk
- 4) Environment
- 5) Weights & Measures

d. Municipal Buildings and Code Enforcement

4. The Licensing Department shall fall under the Department of Personnel Administration for purposes of administrative support.
5. The title and salary of Administrator - Health & Human Services shall be deleted from the personnel ordinances, effective April 1, 1991.

Understanding that this recommendation is contrary to the 1985 recommendation to establish the Health & Human Services Department, we are not now saying that the concept was a failure. Rather, as we constantly fine-tune the way we deliver services to the public, we believe the above proposed configuration to be a more cost effective way of making City Government accessible to the people of our community.

Sincerely,

/s/ Sharon M. Skeels
Sharon M. Skeels
Director of Personnel

cc: Bob Connors, City Administrator

APPROVED

/s/ Daniel E. Bogan
MAYOR

[LOGO] *City of Fall River, Massachusetts*

EXECUTIVE DEPARTMENT

DANIEL E. BOGAN
MAYOR

March 18, 1991

Honorable Joseph Doran, City Clerk
City of Fall River
One Government Center
Fall River, MA 02722

Dear Mr. Doran:

As a result of information received from the state regarding cut backs in local aid for fiscal year 1992 which will affect the city's FY 1992 municipal budget, it has become necessary to reorganize the department of Health and Human Services.

To this end, I have requested that the Department of Health and Human Services and Administrator be eliminated. This action which will become effective April 1, 1991, will require terminating the incumbents employment.

Therefore, effective close of business Friday, March 29, 1991, the appointment of the following municipal official is hereby terminated:

Janet Scott-Harris, 450 Rock Street, Fall River, Massachusetts, as the Administrator, Health and Human Services.

I would like to express my appreciation for her service to the City of Fall River.

This action is not intended to reflect negatively upon her performance but is the result of continued reduction in state aid to the City of Fall River.

A TRUE COPY

ATTEST:

Very truly yours,

/s/ Daniel E. Bogan
Daniel E. Bogan
Mayor

/s/ Joseph F. Doran
CITY CLERK
April 28, 1994

DEB/omc
CC: Janet Scott-Harris

City of Fall River, In City Council

Be it ordained by the City Council of the City of Fall River, Massachusetts, that the Revised Ordinances of the City of Fall River, Massachusetts, 1988 be amended as follows:

Section 1: By striking out Section 2-235 in its entirety and inserting a new section as follows:

The Council on Aging shall be under the administration, control, supervision, and direction of the City Administrator, unless specifically prohibited by statute. The Council on Aging may appoint a director and such other employees as it may required in accordance with the general laws.

Section 2: By striking out therein:

Section 2-441
Section 2-442
Section 2-443
Section 2-444

Section 3: By striking out in Section 2-401(b) the following words "health & human services" and inserting "public health".

Section 4: By striking out Section 2-416 in its entirety and inserting a new section as follows:

There shall be an official of the city known as the veteran's benefits agent and director of veteran's services whose duties it shall be to supervise and operate the veteran's benefits and veteran's services department. Said director shall be appointed by the mayor and shall be subject to the administrative control, supervision, and direction of the

city administrator. In accordance with the provisions of M.G.L.A., c. 115.

Section 5: By inserting therein the following new section 2-444:

Sec. 2-444 Department of Building Inspections – Powers and Duties Generally

(a) There shall be a department of buildings inspections under the control and jurisdiction of the director of building inspections.

(b) The director of building inspections shall be designated inspector of buildings for the city. He shall also perform all other statutory duties as required by this designation.

(c) The director of building inspections acting as building inspector will report to the City Administrator. The director of building inspections shall also exercise the powers and duties of inspector of wires as conferred under M.G.L.A., c. 166 and all others as conferred under chapter 7, as well as others which from time to time the mayor may direct.

(d) The director of building inspections shall be appointed by the Mayor and shall be subject to the administrative control, supervision and direction of the City Administrator, except when prohibited by state statute.

Section 6: By striking out therein Sections 2-445 – 2-451.

Section 7: By inserting therein the following new sections:

Section 2-490 In charge of construction of public buildings.

The department of public works shall have charge of the construction and maintenance of public buildings and related duties.

Section 2-491 Superintending construction of city buildings; making repairs, alterations or additions.

The department of public works shall superintend the construction of all buildings erected by the city and shall perform all repairs, alterations, or additions to all city buildings, including all buildings under the jurisdiction of the board of assessors, such repairs, alterations, and additions to be performed in accordance with and subject to the provisions of this revision and the general law.

Section 2-492 Care and custody of city buildings.

The department of public works shall have the care and custody of all city buildings used by the board of fire commissioners, the board of library trustees, the war veterans or their auxiliaries, and all other city buildings, except where other provision is made by law, and shall keep informed of their condition.

Section 2-493 New buildings for use of other departments.

It shall be the duty of the department of public works to superintend the construction of all new buildings erected for the use of other departments, but no such new construction shall be started without first obtaining the approval of the appropriate board, commission, or department head to the plans and specifications relating to such proposed new building.

Section 2-494 Competitive bids for repairs, alterations, or additions to public buildings.

No repairs, alterations, or additions to any public building in the care or custody of the department of public works shall be made without first advertising for competitive bids for the work to be done, as required by the ordinances of the city and as required by M.G.L.A., c. 43, 28.

Section 2-495 Employing architectural and engineering services.

The department of public works shall employ such architectural and engineering services necessary to perform the duties of the division as requested by the administrator of public works, the mayor, city council, the school committee, or by any board or officer in charge of a department of the city government [sic].

Section 2-496 Employment of carpenters, mechanics, custodians and subordinates.

The department of public works shall employ carpenters, custodians, mechanics

and subordinates who shall render such services as may be required in the performance of the duties of the division.

Section 2-497 Record of city buildings; annual reports.

The deparment [sic] of public works shall keep an accurate record of all buildings belonging to the city which are in its charge and shall annually on or before the first Monday of February, submit to the city administrator a written report showing their condition and the nature and amount of expenditures in detail made upon them for the year ending with last day of December preceding. It shall also prepare as statement of the repairs which may be needed upon each building in the next twelve (12) months and the probable cost thereof.

Section 9: By striking out the following in Sections 2-453 through 2-456 the words "division of municipal buildings and code enforcement" and inserting "department of building inspections".

Section 10: By striking out therein Section 9-16.

Section 11: By striking out Section 9-36 in its entirety and inserting a new section 9-36 as follows:

The director of public health shall execute the administrative policy of the board of health as administrative health agent. The director of public health/health agent shall be responsible for carrying out operational policy of the board of health as defined in M.G.L.A., Chapter 111.

Section 12: By striking out the following in Section 9-41 the words "director of municipal buildings and code enforcement/deputy health agent" and inserting "department of public works", also striking the word "his" and inserting "its".

Section 13: By striking out the following in Section 9-66 (c) in its entirety and inserting a new section 9-66 (c) as follows:

(c) The inspector shall be within the department of public health.

Section 14: By striking out the following in Section 9-81 in its entirety and inserting a new section 9-81 as follows.

Enforcement of the provisions of this division shall be through the director of public health/health agent.

Section 15: By striking out the following in Section 9-82 the words "municipal buildings and code enforcement" and inserting "public health", also striking the word "deputy" after the words capacity as.

Section 16: By striking out the following in Sections 9-129(a)&(b) - 9-130 the words "administrator of health and human services" and inserting "director of public health".

Section 17: By striking out the title of Subdivision B, under Division 2 (Administration) to read as follows:

Subdivision B. Department of Building Inspections

Section 18: By striking out therein Sections 11-51 and 11-52, and by inserting therein the following new sections.

Sec. 11-51. Enforcement Agency

(a) There is hereby created a division of minimum housing within the department of public health for the purpose of enforcing the provisions of this article and such other matters as may be appropriately assigned to it.

(b) The personnel of the division of minimum housing building inspections shall consist of a director of municipal buildings and code enforcement herein after referred to in this article as director and such other inspectors, clerks and other personnel as may be required for the proper organization of the division and for the proper enforcement of this article.

Sec. 11-52. Administration by director ; appointment, qualifications [sic], etc; delegation of powers.

The division of minimum [sic] housing inspections shall be operated under the immediate direction, supervision and control of a director appointed by the board of health. The director may delegate any of his powers or duties under the provisions of this article to any properly qualified employee of the department.

Section 19: By striking out the following in Section 11-54 (b) the words "department of municipal buildings and code enforcement within

the department of health and human services" and inserting "division of Minimum housing".

- Section 20: By striking out the following in Section 12-29 the words "health and human services" and inserting "personnel administration".
- Section 21: By striking out the following in Section 16-216 relating to personnel the words "Administrator of health and human services . . . 16-239" and "Deputy Commissioner of Public Works and Inspector of Buildings/Director of Municipal Buildings and Code Enforcement Inspector of Buildings . . . 16-239" and adding in proper alphabetical order: "Deputy Commissioner of Public Works and Inspector of Buildings/Director of Building Inspections . . . 16-239."
- Section 22: By striking out the following in Section 16-239 the words "Administrator of Health and Human Services" and "Deputy Commissioner of Public Works and Inspector of Buildings/Director of Municipal Buildings and Code Enforcement - Inspector of Buildings".
- Section 23: By striking the following in Section 16-239 the words "Deputy Commissioner of Public Works and Inspector of Buildings/Director of Municipal Buildings and Code enforcement" and inserting "Deputy Commissioner of Public Works and Inspector of Buildings/Director of Building Inspections."

This ordinance to become effective April 1, 1991.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO: 91-12057-PBS

JANET SCOTT-HARRIS,

PLAINTIFF,

vs.

CITY OF FALL RIVER, DANIEL
BOGAN ROBERT L. CONNORS,
and MARILYN RODERICK,

DEFENDANTS.

**MOTION OF THE DEFENDANT, CITY OF
FALL RIVER, FOR A DIRECTED VERDICT
PRESENTED AT THE CLOSE OF THE
PLAINTIFF'S OPENING STATEMENT**

The City of Fall River moves that the Court direct a verdict in its favor following the plaintiff's opening statement.

The plaintiff's complaint against the City of Fall River is that it, through its final decision makers, the Mayor and City Council, eliminated the position she filled thereby ending her employment because she is black or because she exercised her right to freedom of speech.

To effect elimination of the position the plaintiff held an amendment to city ordinances was required. Such an amendment was proposed by the mayor and adopted by the City Council on a 6-2 vote.

On these points there is no dispute.

The plaintiff, through her opening statement, at most, says she will offer evidence from which a jury could conclude that mayor Bogan's motivation was her free speech or race and that council member Roderick voted for the amendment motivated by plaintiff's race or free speech.

The plaintiff clearly does not intend to offer evidence that the motivation of a majority of the members of the City Council [was race or the plaintiff's exercise of the speech] in voting to adopt the amendment.

The elimination of the position the plaintiff filled could only be effected by joint action of the mayor and a majority of the City Council.

Without evidence that a majority of the members of the City Council were motivated to vote in favor of the ordinance amendment by race or free speech the plaintiff cannot as a matter of law satisfy her burden of proof against the City of Fall River.

Respectfully submitted,

/s/ Stephen C. Fulton
 Stephen C. Fulton
 Attorney for City
 of Fall River
 Long, Racicot & Bourgeois
 200 State Street
 Boston, MA 02109
 617-439-4777
 BBO # 181420

c:/SCF/02495

[5/16/94 Denied.
 Patti B. Saris]

UNITED STATES DISTRICT COURT
 FOR THE
 DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS) NO. 91-12057-PBS
Plaintiff)
V.)
CITY OF FALL RIVER, DANIEL)
BOGAN, ROBERT L. CONNORS,)
and MARILYN RODERICK,)
Defendants)

**MOTION OF THE DEFENDANT, CITY OF FALL
 RIVER FOR A DIRECTED VERDICT
 PURSUANT TO F.R.C.P. 50(a).**

The defendant, City of Fall River, moves that the Court enter a directed verdict on the plaintiff's complaint pursuant to F.R.C.P. 50(a) for the following specific reasons:

1. As to so much of Count I as alleges a violation of 42 U.S.C. 1983 (claims based upon 42 U.S.C. 1981 have been voluntarily dismissed)
 - a) there is insufficient evidence upon which a jury would be warranted in finding that the plaintiff has established there was discrimination so as to require the defendant to offer a non-discriminatory justification for the elimination of the position she held.
 - b) there is insufficient evidence upon which a jury would be warranted in

finding that the legitimate and non-discriminatory reason or reasons given by The City of Fall River to justify elimination of the position of Administrator, Health & Human Services was a pretext.

- c] there is insufficient evidence upon which a jury would be warranted in finding that the decision of the Mayor of the City of Fall River to recommend an amendment to the city ordinances which would eliminate the position of Administrator, Health & Human Services was made because the plaintiff who occupied that position was black and with an intent to eliminate the plaintiff from that position because she is black.
- d] there is insufficient evidence upon which a jury would be warranted in finding that the votes of a majority of the City Council of the City of Fall River voting to adopt an amendment to city ordinances which eliminated the position of Administrator, Health & Human Services were made because the plaintiff who occupied that position was black and with an intent to eliminate the plaintiff from that position because she is black.
- e] there is insufficient evidence upon which a jury would be warranted in finding that the elimination of the position of Administrator, Health & Human Services on the Mayor's [sic] proposal and on approval by the votes of a majority of the City Council was a proximate

cause of compensable injury or damages to the plaintiff.

2. As to Count II:

- a] there is insufficient evidence upon which a jury would be warranted in finding that the making or expression of any constitutionally protected statements by the plaintiff was a substantial or motivating factor for the decision of the Mayor of the City of Fall River to recommend an amendment to city ordinances which would eliminate the position of Administrator, Health & Human Services.
- b] there is insufficient evidence upon which a jury would be warranted in finding that the making or expression of any constitutionally protected statements by the plaintiff was a substantial or motivating factor for the votes of a majority of the City Council of the City of Fall River voting to adopt an amendment to the ordinances of that city so as to eliminate the position of Administrator, Health & Human Services.
- c] there is insufficient evidence upon which a jury would be warranted in finding that the elimination of the position of Administrator, Health & Human Services, would not have occurred but for the protected speech of the plaintiff.
- d] there is insufficient evidence upon which a jury would be warranted in finding that the elimination of the position of Administrator, Health & Human

Services on the Mayor's proposal and on approval by the votes of the majority of the City Council was a proximate cause of compensable injury or damages to the plaintiff.

3. Count III has been waived.
4. Count IV has been waived or dismissed.

By its attorney,

/s/ Stephen C. Fulton
 STEPHEN C. FULTON
 Long, Racicot &
 Bourgeois
 200 State Street
 Boston, MA 02109
 Tel. (617) 439-4777

UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS,)

Plaintiff)

C.A. NO. 91-12057

VS.)

CITY OF FALL RIVER,)
 MASSACHUSETTS; DANIEL)
 E. BOGAN, individually and)
 in his former official capacity)
 as Mayor of Fall River,)
 Massachusetts; ROBERT L.)
 CONNORS, individually and)
 in his official capacity as City)
 Administrator; MARILYN)
 RODERICK, individually and)
 in her official capacity as a)
 member of the Fall River City)
 Council;)

Defendants)

**MOTION OF THE DEFENDANTS, ROBERT L.
 CONNORS AND MARILYN RODERICK FOR A
 DIRECTED VERDICT PURSUANT TO F.R.C.P. 50 (a)**

The defendants, Robert L. Connors and Marilyn Roderick move that the Court enter a directed verdict on the plaintiff's complaint pursuant to F.R.C.P. 50(a) for the following specific reasons:

1. As to so much of Counts I as alleges a violation of 42 U.S.C. 1983 (claims based upon 42 U.S.C. 1981 have been voluntarily dismissed)

- a) there is insufficient evidence upon which a jury would be warranted in finding that Robert L. Connors was a proximate cause of the injuries allegedly sustained by the Plaintiff.
- b) there is insufficient evidence upon which a jury would be warranted in finding that Marilyn Roderick was a proximate cause of the injuries allegedly sustained by the Plaintiff.
- c) there is insufficient evidence upon which a jury would be warranted in finding that the vote of Marilyn Roderick to amend city ordinances so as to eliminate the position of Administrator, Health & Human Services was made because the plaintiff who occupied that position was black and with the intent to eliminate the plaintiff from that position because she is black.
- d) there is insufficient evidence upon which a jury would be warranted in finding that the legitimate and non-discriminatory reason or reasons given by Marilyn Roderick to justify elimination of the position of Administrator, Health & Human Services was a pretext.
- e) there is insufficient evidence upon which a jury would be warranted in finding that the true reason the position of Administrator, Health & Human Services was eliminated was that the plaintiff was black.
- f) there is insufficient evidence upon which a jury would be warranted in

finding that the elimination of the position of Administrator, Health & Human Services was a proximate cause of injury or damages to the plaintiff.

- g) there is insufficient evidence upon which a jury would be warranted in finding that the plaintiff suffered any compensable damages as a result of any violation by Robert L. Connors or Marilyn Roderick of rights guaranteed by the Fourteenth Amendment to the United States Constitution.

2. As to Count II:

- a) there is insufficient evidence upon which a jury would be warranted in finding that the making or expression of any constitutionally protected statements by the plaintiff was a substantial or motivating factor for the decision of Marilyn Roderick to vote to amend the city ordinances so as to eliminate the position of Administrator, Health & Human Services.
- b) there is insufficient evidence upon which a jury would be warranted in finding that the elimination of the position of Administrator, Health & Human Services, would not have occurred but for the protected speech of the plaintiff.
- c) there is insufficient evidence upon which a jury would be warranted in finding that the elimination of the position of Administrator, Health & Human Services was a proximate cause of injury or damages to the plaintiff.

- d) there is insufficient evidence upon which a jury would be warranted in finding that the plaintiff suffered any compensable damages as a result of any violation by Robert L. Connors or Marilyn Roderick of rights guaranteed by the First Amendment to the United States Constitution.

Respectfully submitted,

/s/ Bruce A. Assad
 Bruce A. Assad,
 Esquire
 P.O. Box 1268
 Fall River, MA
 02722-1268
 (508) 673-2004

DATED: May 16, 1994

[5/16/94 Denied with
 respect to Ms.
 Roderick. Allowed
 with respect to Mr.
 Connors for the rea-
 sons stated in court.
 Patti B. Saris]

UNITED STATES DISTRICT COURT
 DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS,

Plaintiff,

v.

CITY OF FALL RIVER,
 MASSACHUSETTS; DANIEL E.
 BOGAN, Individually, MARILYN
 RODERICK, Individually,

Defendants.

CIVIL ACTION
 NO. 91-12057-PBS

SPECIAL VERDICT FORM

Saris, U.S.D.J.

CITY OF FALL RIVER

1. Has Ms. Scott-Harris proven that the reason given by the City of Fall River for the elimination of the position of Administrator, Health and Human Services, was not the true reason?

_____ yes _____ no

[Answer Question 2 if you answered Question 1 yes.
 Answer Question 3 if you answered Question 1 no].

2. Has Ms. Scott-Harris proven that the real reason of the City of Fall River for the elimination of the position

of Administrator, Health and Human Services, was intentional racial discrimination?

_____ yes _____ no

[Answer Question 3 if you answered Question 2 yes or no].

3. Has Ms. Scott-Harris proven that her protected speech was a substantial or motivating factor in the City's decision to eliminate the position of Administrator, Health and Human Services?

_____ yes _____ no

[Answer Question 4 if you answered Question or [sic] 2 or 3 yes. Sign and date the verdict form if you answered both questions no].

4. Has Ms. Scott-Harris proven that the elimination of her position by the City of Fall River proximately caused her any injuries?

_____ yes _____ no

[Answer Questions 5 and 6 if you answered Question 4 yes. Otherwise, sign and date the verdict form].

MARILYN RODERICK

5. Has Ms. Scott-Harris proven that Councilwoman Marilyn Roderick voted to approve an amendment of city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services with the intent to terminate plaintiff's employment because she is black?

_____ yes _____ no

6. Has Ms. Scott-Harris proven that her constitutionally protected speech was a substantial or motivating factor in the vote of Fall River City Councilwoman Marilyn Roderick favoring amendment of city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services?

_____ yes _____ no

[Answer Question 7 if you answered Question 5 or 6 yes. Otherwise, proceed to Question 8].

7. Has Ms. Scott-Harris proven that the act of Councilwoman Marilyn Roderick in voting favorably toward the amendments was a proximate cause of the elimination of the position?

_____ yes _____ no

[Answer Questions 8 and 9]

DANIEL BOGAN

8. Has Ms. Scott-Harris proven that Mayor Bogan recommended an amendment to city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services, with the intent to terminate the plaintiff's employment because she is black?

_____ yes _____ no

9. Has Ms. Scott-Harris proven her constitutionally protected speech was a substantial or motivating factor in the recommendation by Daniel Bogan, then Mayor, of the amendment of city ordinances which would have the

effect of eliminating the position of Administrator, Health and Human Services?

_____ yes _____ no

[Answer Question 10 if you answered Question 8 or 9 yes. Proceed to Question 11 if you answered yes to Question 4 or 7. Otherwise, proceed to the end of the verdict slip].

10. If you answered yes to Questions 8 or 9, do you find that the act of Mr. Bogan in recommending the amendment was the proximate cause of the elimination of the position?

_____ yes _____ no

[If you answered Question 4, 7, or 10 yes, proceed to Question 11. Otherwise, proceed to the end of the verdict slip].

DAMAGES

Compensatory

11. If you answered Questions 4, 7, or 10 yes, what amount of money will fairly compensate Ms. Scott-Harris for her injuries?

\$ _____

\$ _____
(words)

Punitive

12. If you answered Question 7 yes, has Ms. Scott-Harris proven that Ms. Roderick acted maliciously or

with reckless indifference to her rights for which punitive damages are warranted?

_____ yes _____ no

13. If so, what amount of punitive damages do you award?

\$ _____

\$ _____
(words)

14. If you answered Question 10 yes, has Ms. Scott-Harris proven that Mr. Bogan acted maliciously or with reckless indifference to her rights for which punitive damages are warranted?

_____ yes _____ no

15. If so, what amount of punitive damages do you award?

\$ _____

\$ _____
(words)

I certify that the jurors unanimously concur in the above decision.

FOREPERSON

Date: _____

[Has she proven by preponderance of evidence that her position was eliminated due to race?]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS,) [Original 3:55 PM
Plaintiff,) Verdict 5/26/94]
v.) CIVIL ACTION
CITY OF FALL RIVER,) NO. 91-12057-PBS
MASSACHUSETTS; DANIEL E.)
BOGAN, Individually, MARILYN)
RODERICK, Individually,)
Defendants.)

SPECIAL VERDICT FORM

Saris, U.S.D.J.

[Mayor and majority of
City Councilors (Final Policy Makers)]

CITY OF FALL RIVER

1. Has Ms. Scott-Harris proven that the reason given by the City of Fall River for the elimination of the position of Administrator, Health and Human Services, was not the true reason?

_____ yes ☒ no

[Answer Question 2 if you answered Question 1 yes.
Answer Question 3 if you answered Question 1 no].

2. Has Ms. Scott-Harris proven that the real reason of the City of Fall River for the elimination of the position

of Administrator, Health and Human Services, was intentional racial discrimination?

_____ yes ☒ no

[Answer Question 3 if you answered Question 2 yes or no].

3. Has Ms. Scott-Harris proven that her protected speech was a substantial or motivating factor in the City's decision to eliminate the position of Administrator, Health and Human Services?

☒ yes _____ no

[Answer Question 4 if you answered Question 2 or 3 yes. Sign and date the verdict form if you answered both questions no].

4. Has Ms. Scott-Harris proven that the elimination of her position by the City of Fall River proximately caused her any injuries?

☒ yes _____ no

[Answer Questions 5 and 6 if you answered Question 4 yes. Otherwise, sign and date the verdict form].

MARILYN RODERICK

5. Has Ms. Scott-Harris proven that Councilwoman Marilyn Roderick voted to approve an amendment of city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services with the intent to terminate plaintiff's employment because she is black?

_____ yes ☒ no

6. Has Ms. Scott-Harris proven that her constitutionally protected speech was a substantial or motivating factor in the vote of Fall River City Councilwoman Marilyn Roderick favoring amendment of city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services?

☒ yes ☐ no

[Answer Question 7 if you answered Question 5 or 6 yes. Otherwise, proceed to Question 8].

7. Has Ms. Scott-Harris proven that the act of Councilwoman Marilyn Roderick in voting favorably toward the amendments was a proximate cause of the elimination of the position?

☒ yes ☐ no

[Answer Questions 8 and 9]

DANIEL BOGAN

8. Has Ms. Scott-Harris proven that Mayor Bogan recommended an amendment to city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services, with the intent to terminate the plaintiff's employment because she is black?

☐ yes ☒ no

9. Has Ms. Scott-Harris proven her constitutionally protected speech was a substantial or motivating factor in the recommendation by Daniel Bogan, then Mayor, of the amendment of city ordinances which would have the

effect of eliminating the position of Administrator, Health and Human Services?

☒ yes ☐ no

[Answer Question 10 if you answered Question 8 or 9 yes. Proceed to Question 11 if you answered yes to Question 4 or 7. Otherwise, proceed to the end of the verdict slip].

10. If you answered yes to Questions 8 or 9, do you find that the act of Mr. Bogan in recommending the amendment was the proximate cause of the elimination of the position?

☒ yes ☐ no

[If you answered Question 4, 7, or 10 yes, proceed to Question 11. Otherwise, proceed to the end of the verdict slip].

DAMAGES

Compensatory

11. If you answered Questions 4, 7, or 10 yes, what amount of money will fairly compensate Ms. Scott-Harris for her injuries?

\$ 156,000.00

\$ One hundred fifty six
thousand dollars
(words)

Punitive: [Exemplary damages – not against the city only the individuals. Punish a defendant for his or her actions or to deter others!]

12. If you answered Question 7 yes, has Ms. Scott-Harris proven that Ms. Roderick acted maliciously or with reckless indifference to her rights for which punitive damages are warranted?

✓ yes no

13. If so, what amount of punitive damages do you award?

\$ 15,000.00

\$ Fifteen thousand dollars
(words)

14. If you answered Question 10 yes, has Ms. Scott-Harris proven that Mr. Bogan acted maliciously or with reckless indifference to her rights for which punitive damages are warranted?

✓ yes no

15. If so, what amount of punitive damages do you award?

\$ 60,000.00

\$ Sixty thousand dollars
(words)

I certify that the jurors unanimously concur in the above decision.

James F. McManus
FOREPERSON

Date: 5/26/94

5/26/94

Judge Saris,

On this revised form why is the instructions regarding question 2, crossed out with your initials?

Jim McManus

Could you please send up the tape?

J.Mc.

According to your instructions and answers to our questions yesterday, we are confused as to why we cannot decide differently on 1 & 3?

They were seperated [sic] in the charges!

J.Mc.

5/26/94

You must decide whether plaintiff has proven that her protected speech was a substantial or motivating factor in the city's decision to eliminate the position of administrator of Health and Human Services.

If the budget was the substantial motivating factor in the decision to eliminate the position, you must answer Q 1 no. If you answer no, go no further. ~~and the court will~~ Sign and date the form.

If speech was the substantial motivating factor in the decision, you must answer Q. 1 yes. Then proceed to Q. 2 and the remainder of the verdict form.

Patti B. Saris
5:10 pm

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS,

Plaintiff,

v.

CITY OF FALL RIVER,
MASSACHUSETTS; DANIEL E.
BOGAN, Individually, MARILYN
RODERICK, Individually,

Defendants.

) [Filed in court 5/26/94
) at 5:20 P.M. HMC]

) CIVIL ACTION
) NO. 91-12057-PBS

[REVISED]

SPECIAL VERDICT FORM

Saris, U.S.D.J.

CITY OF FALL RIVER

1. Has Ms. Scott-Harris proven that the reason given by the City of Fall River for the elimination of the position of Administrator, Health and Human Services, was not the true reason?

☒ yes ☐ no

~~[Answer Question 2 if you answered Question 1 yes.
Answer Question 3 if you answered Question 1 no].~~

2. Has Ms. Scott-Harris proven that the real reason of the City of Fall River for the elimination of the position

of Administrator, Health and Human Services, was intentional racial discrimination?

_____ yes ☒ no

[Answer Question 3 if you answered Question 2 yes or no].

3. Has Ms. Scott-Harris proven that her protected speech was a substantial or motivating factor in the City's decision to eliminate the position of Administrator, Health and Human Services?

☒ yes _____ no

[Answer Question 4 if you answered Question 2 or 3 yes. Sign and date the verdict form if you answered both questions no].

4. Has Ms. Scott-Harris proven that the elimination of her position by the City of Fall River proximately caused her any injuries?

☒ yes _____ no

[Answer Questions 5 and 6 if you answered Question 4 yes. Otherwise, sign and date the verdict form].

MARILYN RODERICK

5. Has Ms. Scott-Harris proven that Councilwoman Marilyn Roderick voted to approve an amendment of city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services with the intent to terminate plaintiff's employment because she is black?

_____ yes ☒ no

6. Has Ms. Scott-Harris proven that her constitutionally protected speech was a substantial or motivating factor in the vote of Fall River City Councilwoman Marilyn Roderick favoring amendment of city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services?

☒ yes _____ no

[Answer Question 7 if you answered Question 5 or 6 yes. Otherwise, proceed to Question 8].

7. Has Ms. Scott-Harris proven that the act of Councilwoman Marilyn Roderick in voting favorably toward the amendments was a proximate cause of the elimination of the position?

☒ yes _____ no

[Answer Questions 8 and 9].

DANIEL BOGAN

8. Has Ms. Scott-Harris proven that Mayor Bogan recommended an amendment to city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services, with the intent to terminate the plaintiff's employment because she is black?

_____ yes ☒ no

9. Has Ms. Scott-Harris proven her constitutionally protected speech was a substantial or motivating factor in the recommendation by Daniel Bogan, then Mayor, of the amendment of city ordinances which would have the

effect of eliminating the position of Administrator, Health and Human Services?

☒ yes ☐ no

[Answer Question 10 if you answered Question 8 or 9 yes. Proceed to Question 11 if you answered yes to Question 4 or 7. Otherwise, proceed to the end of the verdict slip].

10. If you answered yes to Questions 8 or 9, do you find that the act of Mr. Bogan in recommending the amendment was the proximate cause of the elimination of the position?

☒ yes ☐ no

[If you answered Question 4, 7, or 10 yes, proceed to Question 11. Otherwise, proceed to the end of the verdict slip].

DAMAGES

Compensatory

11. If you answered Questions 4, 7, or 10 yes, what amount of money will fairly compensate Ms. Scott-Harris for her injuries?

\$ 156,000.00
\$ One hundred fifty six
thousand dollars
(words)

Punitive

12. If you answered Question 7 yes, has Ms. Scott-Harris proven that Ms. Roderick acted maliciously or

with reckless indifference to her rights for which punitive damages are warranted?

☒ yes ☐ no

13. If so, what amount of punitive damages do you award?

\$ 15,000.00
\$ Fifteen thousand dollars
(words)

14. If you answered Question 10 yes, has Ms. Scott-Harris proven that Mr. Bogan acted maliciously or with reckless indifference to her rights for which punitive damages are warranted?

☒ yes ☐ no

15. If so, what amount of punitive damages do you award?

\$ 60,000.00
\$ Sixty thousand dollars
(words)

I certify that the jurors unanimously concur in the above decision.

James F. McManus
FOREPERSON

Date: 5/26/94

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
CIVIL COURTNOTE FORM

Case No. CA 91-12057-PBS

Date: see below

JANET SCOTT-HARRIS

V.

CITY OF FALL RIVER, ET AL.

JUDGE: Saris CLERK: Whitney

REPORTER: see below

for PLAINTIFF(s): Schwartz, Sweeney

for DEFENDANT(s): Marchand, Assad, Fulton

CLERK NOTES:

05/17/94: JURY TRIAL, DAY TWO. Note from juror advising of inadvertent contact w/witness in elevator. Counsel advised. No action taken. Note filed (attached).

05/25/94: JURY TRIAL, DAY EIGHT. Deliberations begin.

Question 1 rec'd 12:00 p.m. Responses iescribed [sic] by Judge after consultation w/counsel, and question is ret'd to jury. Jury instructed not to dispose of question as it will be filed and made part of record.

Question 2 rec'd 2:00 p.m. Response enscribed by Judge after consultation w/counsel, and question ret'd to jury. Same instruction.

Question 3 rec'd 2:20 p.m. Response read in Court after consultation w/counsel. Reporter: M. Cloonan.

5:00 p.m. ADJOURNED until 9:00 a.m. 05/26/94.

05/26/94: JURY TRIAL, DAY NINE. Deliberations resume.

Question 4 rec'd 10:30 a.m. Response enscribed by Judge after consultation w/counsel. Question ret'd to jury w/instruction not to dispose of it.

3:55 p.m. Verdict reached. Reporter: M. Cloonan. Verdict form improperly filled out (see ORIGINAL VERDICT form, 3:55 p.m., 05/26/94 attached). Jury sent back to deliberate after curative instruction given.

Question 5 rec'd 4:30 p.m. Response enscribed by Judge after consultation w/counsel and ret'd to jury.

5:20 p.m. Jury returns verdict. Jury finds for plaintiff on Count Two of the complaint. Jury awards compensatory damages in the amount of \$156,000.00. Punitive damages awarded against dft Roderick in the amount of \$15,000.00 and against dft Bogan in the amount of \$60,000.00. Verdict recorded. REVISED VERDICT FORM filed. Jury discharged.

Sidebar w/counsel: Pltf's mtn w/supporting aff on attys fees due 06/03/94, response 06/10/94. JUDGMENT will then be entered, w/post-trial motions t/b/f/thereafter. Dfts orally renew motion for mistrial; DENIED.

Original (for docketing)/Clerk's Copy

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS,

Plaintiff,

CIVIL ACTION
NO. 91-12057-PBS

v.

CITY OF FALL RIVER,
DANIEL E. BOGAN, and
MARILYN RODERICK,

Defendants.

ORDER OF JUDGMENT

SARIS, D.J.

June 3, 1994

This action came before the Court for a trial by jury. The issues have been tried, and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED:

JUDGMENT for the plaintiff, Janet Scott-Harris, on Count Two of the complaint. Compensatory damages are awarded in the amount of One Hundred Fifty-Six Thousand Dollars (\$156,000.00). Punitive damages are awarded against defendant Marilyn Roderick in the amount of Fifteen Thousand Dollars (\$15,000.00) and against defendant Daniel E. Bogan in the amount of Sixty Thousand Dollars (\$60,000.00).

By the Court,

/s/ Deborah L. Whitney [SEAL]
Deputy Clerk

[The Current Interest rate is 5.02% per annum.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS,

Plaintiff

C.A. NO.
91-12057-PBS

VS.

CITY OF FALL RIVER,
MASSACHUSETTS; DANIEL E.
BOGAN, Individually, MARILYN
RODERICK, individually,

Defendants

MOTION OF THE DEFENDANT CITY OF FALL RIVER
FOR JUDGMENT NOTWITHSTANDING THE VERDICT
PURSUANT TO FED. R. CIV P. 50(b)

The defendant, City of Fall River, moves that judgment be entered in its behalf on Count II of the plaintiff's complaint notwithstanding the verdict pursuant to Fed. R. Civ. P. 50(b) on the grounds set forth in its motions for directed verdict made at trial.

A memorandum in support of this motion is served and filed herewith.

By its attorney,

/s/ Stephen C. Fulton/EB
Stephen C. Fulton
Long, Racicot & Bourgeois
200 State St.
Boston, Ma. 02109
617-439-4777

[Saris, DJ] 1/30/95 DENIED for the reasons stated in the Court's Memorandum dated 1/27/95.

By the Court: Deborah L. Whitney -
Clerk.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C.A. NO. 91-12057

JANET SCOTT-HARRIS,

Plaintiff

VS.

CITY OF FALL RIVER,
MASSACHUSETTS; DANIEL E.
BOGAN, individually, MARILYN
RODERICK, individually

Defendants

**MOTION OF THE DEFENDANT, MARILYN
RODERICK FOR JUDGMENT NOTWITHSTANDING
THE VERDICT PURSUANT TO F.R.C.P. 50 (b)**

The defendant, Marilyn Roderick, moves that judgment be entered in her behalf on Count II of the Plaintiff's Complaint notwithstanding the verdict pursuant to Fed. R. Civ. P. 50 (b) on the grounds set forth in her motions for directed verdict made at trial and on the grounds that Marilyn Roderick is entitled to absolute immunity.

A memorandum in support of this motion is served and filed herewith.

Respectfully submitted,

/s/ Bruce A. Assad
Bruce A. Assad, Esquire
10 Purchase Street
P.O. Box 1268
Fall River, MA 02722-1268
(508) 673-2004

DATED: June 15, 1994

[*Saris, DJ* 1/30/95 DENIED for the reasons stated in the Court's Memorandum dated 1/27/95.

By the Court: Deborah L. Whitney
Clerk.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C.A. NO. 91-12057-PBS

JANET SCOTT-HARRIS,

Plaintiff

VS.

CITY OF FALL RIVER,
MASSACHUSETTS, DANIEL E.
BOGAN, Individually, MARILYN
RODERICK, Individually,

Defendants

**MOTION OF THE DEFENDANT, DANIEL BOGAN
FOR JUDGMENT NOTWITHSTANDING THE
VERDICT PURSUANT TO FED. R. CIV. P. 50(b)**

The Defendant, Daniel Bogan, moves that judgment be entered in his behalf on Count II of the Plaintiff's complaint notwithstanding the verdict pursuant to Fed. R. Civ. P. 50(b) on the grounds set forth in its motions for directed verdict made at trial.

A memorandum in support of this motion is served and filed herewith.

DATED: June 16, 1994

By his attorney,
DANIEL E. BOGAN, Defendant,

/s/ Robert J. Marchand
Robert J. Marchand, Esquire
DRISCOLL, MARCHAND
& BOYER
206 Winter Street,
P.O. Box 2527
Fall River, MA 02722
(508)672-8652

[Saris, D] 1/30/95 DENIED for the reasons stated in the Court's Memorandum dated 1/27/95.

By the Court: Deborah L. Whitney
Clerk.]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS,
Plaintiff

v.

CITY OF FALL RIVER,
MARILYN RODERICK, and
DANIEL BOGAN,
Defendants

CIVIL ACTION NO.
91-12057-PBS

MEMORANDUM AND ORDER

August 11, 1995

SARIS, U.S.D.J.

INTRODUCTION

This case arises out of a May 26, 1994, jury verdict in favor of the plaintiff Janet Scott-Harris against defendants City of Fall River ("the City"), City Councilor Marilyn Roderick ("Roderick"), and former Mayor Daniel E. Bogan ("Bogan"). Having missed the deadline for filing an appeal, the defendants move for an order: (1) to reopen the time for appeal pursuant to Fed. R. App. P. 4(a)(6); (2) to confirm that the Court would treat the plaintiff's Motion for Attorneys Fees as a Motion to Alter or Amend the Judgment; (3) to vacate any final judgment and order with respect to plaintiff's motion for attorney's fees pursuant to Fed. R. Civ. P. 60(b)(6) and reenter the same; and (4) to enter an amended judgment pursuant to

Fed. R. Civ. P. 58 and to provide notice of that entry pursuant to Fed. R. Civ. P. 77.

After hearing, the Court **ALLOWS** the motions to reopen the time for appeal pursuant to Fed. R. App. 4(a)(6) (Docket Nos. 113, 117, and 120). The remaining motions (Docket Nos. 110, 111, 112, 116, and 119) are **DENIED**.

FACTUAL BACKGROUND

On May 26, 1994, a federal jury found that plaintiff Janet Scott-Harris' protected speech was a substantial or motivating factor in the defendants' elimination, by ordinance, of her position as Administrator of the Department of Health and Human Services. Accordingly, the jury found defendant City liable under 42 U.S.C. § 1983 for compensatory damages in the amount of \$156,000, and defendants Bogan and Roderick liable for punitive damages in the amount of \$60,000 and \$15,000, respectively. The Court entered judgment in accordance with the jury verdict on June 6, 1994.

Following the unfavorable verdict, all three defendants filed motions for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b), and for a new trial pursuant to Fed. R. Civ. P. 59. Plaintiff filed several motions for attorney's fees and costs.

The Court held a hearing on the defendants' post-trial motions on September 29, 1994. After taking the matter under advisement at the conclusion of the hearing, the court held an unrecorded sidebar conference to discuss settlement. At the end of the settlement conference,

the subject of the plaintiff's pending Motions for Attorney's Fees came up.¹ Defendants had filed no written opposition to plaintiff's motions. Although confirming that fees were unopposed, defense counsel requested that the Court postpone the award of attorney's fees pending a decision on their post-trial motions. The Court agreed.

While memories differ on the precise language used by the Court and counsel, all counsel agree that this court did not enter any order pursuant to Fed. R. App. P. 4(a)(4)(D) or Fed. R. Civ. P. 58 to extend the time of the appeal period. All counsel also agree that the Court made no representations as to the time limit for filing an appeal, and indeed that the subject of appeal was never discussed. However, it is also undisputed that *all* defense attorneys involved in the case departed from the sidebar with the mistaken understanding that judgment in the case was not "final" until the Court ruled on the post-trial Rule 50 and Rule 59 motions and, if denied, until judgment was amended to include the attorney's fees. Accordingly, they did not understand that pursuant to Fed. R. Civ. P. 54 and 58, as amended effective December 1, 1993, unless otherwise ordered, the court enters a *separate* judgment on attorney's fees. Fed. R. Civ. P. 58 provides:

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum

¹ Plaintiff filed her initial motion for attorneys' fees on June 6, 1994. Two supplemental motions were later filed. Plaintiff filed a third supplemental motion for attorney's fees on June 1, 1995, which the Court subsequently denied.

certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) . . . *Entry of judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees*, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. . . .

Fed. R. Civ. P. 58. (Emphasis added). Thus, when the Court agreed not to award attorney's fees until after ruling on the post-trial motions, counsel construed that as meaning that "judgment" would not be final until the Court entered judgment on the attorney's fees.

Hearing that the attorney's fees were unopposed, the Court clerk endorsed an order allowing plaintiff's unopposed motions for attorney's fees on September 29, 1994 – the day of defendants' post-trial motions hearing. In accordance with the Court's understanding of defense counsel's request, the Court did not order entry of judgment on the attorney's fees pursuant to Fed. R. Civ. P. 58 because of the pending motions pursuant to Fed. R. Civ. P. 59. On October 7, 1994, the ruling on attorney's fees was entered on the docket. The defense attorneys did not get a copy of this Court's marginal annotation allowing plaintiff's motion for attorney's fees as unopposed until April 7, 1995, when plaintiff's attorney faxed them the demand letter along with a copy of its attorney's fees motion which contained the margin order.

On January 27, 1995, the Court denied the defendants' post-trial motions. That order was entered upon the docket on January 30, 1995. Due to a clerical error by the Court staff, a copy of the memorandum and order denying the post-trial motions was mailed to only two of the attorneys. While the docket reflects that the clerk's office sent a copy of the memorandum and order to the City's attorney, Stephen Fulton ("Fulton"), it was returned by the Post Office for lack of a forwarding address. The docket clerk had apparently mailed it to the wrong address. According to Fulton, it was never remailed, and the docket is unclear as to remailing. Bogan's attorney, Robert Marchand ("Marchand") did not receive notice of the judgment from the Court until subsequent to February 22, 1995. The docket clerk never sent Roderick's attorney, Bruce Assad ("Assad"), a copy of the decision.

Despite the clerical glitches, all counsel learned of the court's order because of press coverage by February 1, 1995. On January 31, 1995, a news reporter had informed attorney Assad that the Court had denied the defendants' post-trial motions and forwarded him a copy of the Court's memorandum which Assad received on or about February 1, 1995. The same day Assad learned of the decision from the news reporter, he telephoned attorney Fulton to inform him that a decision on the motions had been reached. As a result, Fulton went to the clerk's office on February 1, 1995, and picked up a copy of the memorandum and order on the defendants' post-trial motions. As with the other copies of the memorandum and order, the date of entry was not indicated on the face of the memorandum and order.

By February 6, 1995,² all defense attorneys received a copy of the plaintiff's letter to the Court from plaintiff's counsel indicating that the Court had rendered a decision on the defendants' motions, but that a decision on the attorney's fees remained outstanding. The plaintiff's letter to the Court stated, in pertinent part:

I received the Court's memorandum and Order on the defendants' motion for J.N.O.V.. The only remaining issue *before judgment can be entered* is the plaintiff's unopposed motion for attorney's fees.

(Emphasis added). Plaintiff wrote this letter in good faith, not to mislead defense counsel. This letter reflects the misunderstanding all attorneys continued to have about the event which would trigger the appeal period.

On February 24, 1995, Fulton telephoned the docket clerk and asked whether there was a ruling on the plaintiff's attorney's fees, or any final judgment entered on the docket. According to Fulton's affidavit, "[h]er response was that there was no such ruling and that *the only ruling on the docket was denial of the defendants' motions for judgment.*" (Emphasis added). The docket clerk has no memory of that conversation. However, because Fulton, as well as Assad and Marchand, believed that judgment was not final until the Court entered an order amending the judgment on attorney's fees, they did not file an appeal. Fulton called again during the week of March 13 and got a similar status report.

² Assad, Marchand, and Fulton received copies of the plaintiff's letter on February 2, 4, and 6, respectively.

On April 7, 1995, the defendants received a demand for satisfaction of judgment from the plaintiff's attorney. The demand notified the defendants that judgment was final, and that the appeal period had expired. On April 11, 1995, the defendants filed the four motions which are the subject of this memorandum.

DISCUSSION

1. The Procedural Framework.

Federal Rule of Appellate Procedure 4(a)(1) requires notice of appeal to "be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from. . . ." Fed. R. App. P. 4(a)(1). The timely filing of a notice of appeal is mandatory and jurisdictional. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315, 108 S. Ct. 2405, 2408 (1988); *see also Air Line Pilots Ass'n v. Precision Valley Aviation, Inc.*, 26 F.3d 220, 223 (1st Cir. 1994); *Feinstein v. Moses*, 951 F.2d 16, 19 (1st Cir. 1991); *In re O.P.M. Leasing Services, Inc.*, 769 F.2d 911, 916 (2d Cir. 1985).

In *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 108 S. Ct. 1717 (1988), the Supreme Court enunciated a bright-line rule for the commencement of the appeal period: the appellate period begins once a final decision on the merits is reached, irrespective of a claim for attorney's fees. 486 U.S. at 202-3, 108 S. Ct. at 1722. In affirming the denial of the appeal as untimely, the Court reasoned that unless a claim for attorney's fees goes to the merits of the case itself, it is a collateral issue and thus does not toll the appeal period. *Id.* at 200, 108 S. Ct. at

1721 ("As a general matter, at least, we think it is indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain.").

In the wake of *Budinich*, the procedural rules were amended to reflect the Supreme Court's decision. Rule 58 of the Federal Rules of Civil Procedure provides that the appeal period shall not be extended, in the absence of a specific court order, in order to award attorney's fees pursuant to Fed. R. Civ. P. 54(d)(2). Under Rule 58, a motion for attorney's fees extends the appeal period only upon a court order "that the [attorney's fees] motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59."³ Fed. R. Civ. P. 58. While recognizing that "[o]rdinarily the pendency or post-judgment filing of a claim for attorney's fees will not affect the time for appeal from the underlying judgment," the Advisory Committee Notes to the 1993 Amendment of Rule 58 make clear that courts have discretion to delay the finality of judgment under Fed. R. App. P. 4(a) when there is a dispute over fees. Thus,

to accomplish this result requires entry of an order by the district court *before* the time a notice of appeal becomes effective for appellate purposes. If the order is entered, the motion for

³ Rule 59(e), governing motions to alter or amend judgment, provides district courts with the authority "to rectify its own mistakes in the period immediately following the entry of judgment." *White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445, 450, 102 S. Ct. 1162, 1165-66 (1982); see also Fed. R. Civ. P. 59, Notes of Advisory Committee on Rules, 1946 Amendment to Subdivision (e).

attorney's fees is treated in the same manner as a timely motion under Rule 59.

Fed. R. Civ. P. 58, Notes of Advisory Committee, 1993 Amendment (Emphasis added).

Likewise, Rule 4(a)(4) excludes motions for attorney's fees from those which extend the timetable for filing an appeal unless "a district court under Rule 58 extends the time for appeal." Fed. R. App. P. 4(a)(4)(D) (Emphasis added). The 1993 amendment to Fed. R. App. P. 4(a)(4) was intended to conform to the bright-line rule set forth in *Budinich* regarding the commencement of the appeal period. Fed. R. App. P. 4(a)(4), Notes of the Advisory Committee, 1993 amendment.

Fed. R. Civ. P. 54(d)(2)(c) provides that claims for attorney's fees shall be made by motion, and after they are determined by the court, "a judgment shall be set forth in a separate document as provided in Rule 58." The notes of the Advisory Committee to the 1993 Amendment state: "Fee awards should be made in the form of a separate judgment under Rule 58 since such awards are subject to review in the court of appeals."

Once the district court issues an order or judgment, Rule 77(d) of the Federal Rules of Civil Procedure requires the clerk of the court to serve notice of entry of an order or judgment "immediately" upon its entry. Yet, the Rule specifically provides that:

[l]ack of notice of entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in

Rule 4(a) of the Federal Rules of Appellate Procedure.

Fed. R. Civ. P. 77(d). Thus, while Rule 77(d) imposes on parties the duty to inquire periodically into the litigation's status and to ascertain when the court enters an order that they wish to protest, Rule 4(a) of the Federal Rules of Appellate Procedure provides authority for the Court to "ease strict sanctions now imposed on appellants whose notices of appeal are filed late because of their failure to receive notice of entry of judgment." Notes of Advisory Committee, 1991 Amendment. See *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1202 (5th Cir. 1993) (Fed. R. App. P. 4(a) provides an exception to Fed. R. Civ. P. 77(d)); *In re O.P.M. Leasing Services, Inc.*, 769 F.2d 911, 917 (2d Cir. 1985) (pre-4(a)(6) decision construing Fed. R. Civ. P. 77 as imposing duty on counsel to discern status of litigation).

2. Reopening the Appeal Period.

The Court's denial of the defendants' post-trial motions was entered on January 30, 1995. The defendants failed to file a notice of appeal by the March 1, 1995 deadline. Unless this case falls within one of the exceptions to the requirements of Rule 4(a)(1), the appeal is untimely. The defendants contend that the Court has discretion to reopen the appeal period pursuant to Fed. R. App. P. 4(a)(6).

Rule 4(a)(6) authorizes an extension of the appeal period when the appellant fails to receive notice of the entry of judgment or order within 21 days of its entry. See

Avolio v. County of Suffolk, 29 F.3d 50, 52 (2d Cir. 1994) (describing Fed. R. App. P. 4(a)(6)). In such instances,

the district court may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

Fed. R. App. P. 4(a)(6); see also *Zimmer St. Louis, Inc. v. Zimmer Co.*, 32 F.3d 357, 360 (8th Cir. 1994) (discussing Fed. R. App. P. 4(a)(6)); *Vahan v. Shalala*, 30 F.3d 102, 103 (9th Cir. 1994) (dismissing appeal because motion was not filed within seven days of receiving actual notice of the judgment as required by Rule 4(a)(6)). The 1991 amendment to Rule 4(a)(6) provides "a limited opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk pursuant to [Fed. R. Civ. P. 77(d)], is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal." Notes of the Advisory Committee on Appellate Rules, 1991 Amendment. The rule contemplates receipt of notice of the entry of the judgment, not merely receipt of the judgment. See *Virella-Nieves v. Briggs & Stratton Corp.*, 53 F.3d 451, 453 (1st Cir. 1995) (distinguishing notice of order from notice of its entry); *Avolio v. County of Suffolk*, 29 F.3d at 53 (notice of entry of judgment "from the clerk or any party" must be written notice).

Relief under Fed. R. App. P. 4(a)(6) is discretionary. See *In the Matter of Jones*, 970 F.2d 36, 39 (5th Cir. 1992). The Ninth Circuit has placed limits on the discretion afforded district courts. See *Nunley v. City of Los Angeles*,

52 F.3d 792, 798 (9th Cir. 1995). In *Nunley*, the court acknowledged that Rule 4(a)(6) provides some discretion to district courts, but held that "where non-receipt has been proven and no other party would be prejudiced, the denial of relief cannot rest on a party's failure to learn independently of the entry of judgment during the thirty-day period for filing notices of appeal." *Id.* at 789.

3. Sufficiency of Oral Notification of Entry.

The circuits split as to whether oral notification of entry suffices under Rule 4(a)(6). Compare *Avolio v. County of Suffolk*, 29 F.3d at 53 (Rule 4(a)(6) contemplates written notice: "an oral communication simply is not sufficient to trigger the relevant time periods") and *Vahan v. Shalala*, 30 F.3d at 103 (recognizing that despite earlier oral notification, notice effective when appellant received written copy of judgment) with *Zimmer St. Louis, Inc. v. Zimmer Co.*, 32 F.3d 357 (8th Cir. 1994) (appellant received notice of order denying post-trial motions, which was the trigger for appeal period, through a discussion with the judge's clerk).

Here, the defendants, as parties to this action, were entitled to written notice of the entry of the order denying their post-trial motions, which initiated the period for appeal. See Fed. R. App. P. 4(a)(4). Nevertheless, the defendants failed to receive notice of its entry within the 21-day period. Fed. R. App. P. 4(a)(6). The plaintiff argues that since all counsel knew that the post-trial motions were denied by February 1, 1995, they fall outside the rule's scope. However, the Court's memorandum and order did not indicate its date of entry on the docket. See

Virella-Nieves v. Briggs & Stratton Corp., 53 F.3d 451, 453 (1st Cir. 1995) (distinguishing notice of order from notice of its entry); *Avolio v. County of Suffolk*, 29 F.3d at 53 (notice of entry is the starting point).

Attorney Fulton received oral notice that the order was entered on February 24, 1995, but the record is unclear whether he passed on this information to other counsel who all worked as a close team throughout this litigation. However, even if Fulton did not inform Marchand and Assad that the orders denying the post-trial motions had been entered, it was inexcusable neglect not to check themselves. See *Virella-Nieves v. Briggs & Stratton Corp.*, 53 F.3d at 453-54 (no excusable neglect found where party were on notice that dispositive orders had been signed but failed to inquire when the orders were docketed within reasonable time); *In re O.P.M. Leasing Services, Inc.*, 769 F.2d 911, 918 (2d Cir. 1985) (no excusable neglect found where appellant did not receive notice of entry of judgment or a copy of the court's opinion and overlooked report of decision published in a law journal); *Fase v. Seafarers Welfare and Pension Plan*, 574 F.2d 72, 77 (2d Cir. 1978) (no excusable neglect found where parties received copies of court's memorandum opinion and order but failed to inquire as to the deadline for appeal). Accordingly, all counsel had oral or constructive notice of entry of the orders.⁴

⁴ In urging the Court to decline exercising its discretion under Fed. R. App. P. 4(a)(6), plaintiff argues that defendants' failure to ascertain the date of entry of the order does not constitute "excusable neglect."

At least by April 7, 1995, all defendants received plaintiff's demand letter seeking satisfaction of the judgment. This letter constitutes actual written notice of the entry of the judgment by a party. The Advisory Committee notes to the 1991 Amendments to Fed. R. Civ. P. 77(d) state: "The effect of the revisions is to place a burden on prevailing parties who desire certainty that the time for appeal is running." Because this Court agrees with the *Avolio* court that only written notice of the entry of judgment is sufficient to trigger the seven day timetable to reopen the appeal period, defendants' Rule 4(a)(6) motions filed on April 11, 1995, four days after plaintiff's letter, are timely.

Plaintiff improperly reads Fed. R. App. P. 4(a)(5)'s excusable neglect standard into subsection (6). See *Nunley v. City of Los Angeles*, 52 F.3d at 798 (concept of excusable neglect does not apply to Rule 4(a)(6)); *Avolio v. County of Suffolk*, 29 F.3d 50, 54 (2d Cir. 1994) (court cannot deny relief under Rule 4(a)(6) based inexcusable neglect for not having learned of the entry of judgment). In *Virella-Nieves v. Briggs & Stratton Corp.*, 53 F.3d 451, the First Circuit reviewed whether the defendants were entitled to an extension to file notices of appeal under subdivision (a)(5) where they had received a copy of the order, but no indication that the order had been entered upon the docket. In noting that the defendants had been placed on notice that the dispositive orders had been signed, but had chosen to wait 27 days before trying to ascertain whether the orders had been entered, the court found no excusable neglect. However, the Court noted that 4(a)(6) "may supply an alternate basis for the district court to grant defendants additional time to appeal." *Id.* at 454.

4. Exercise of Discretion.

The Court will exercise its discretion under Fed. R. Civ. P. 4(a)(6) to allow defendants' motion to reopen the appeal period for the following reasons. First, the case involves significant issues involving the quantum of proof necessary to impose municipal liability for employment decisions made by a legislative entity like a city council, and the applicability of the doctrine of legislative immunity under Section 1983. The stakes are high. Punitive damages have been awarded against elected officials, a former mayor and vice-chair of the city council, for violations of the civil rights of the first African-American to be hired by the City of Fall River in a management position. It is in the interests of justice not to preclude appellate rights in this case.

Second, defense counsel Fulton did check with the clerk's office to learn the status of the judgment to make sure his appeal was timely, but did so under a misapprehension of law that the judgment was not "final" until it included attorney's fees. Generally this error of law would not persuade me to exercise my discretion to allow the re-opening of the appeal period. The law has been clear since the *Budinich* opinion in 1988 – and any ambiguities have been clarified by the 1991 and 1993 amendments to the rules – that a motion for attorney's fees does not toll the appeal period. Nonetheless, counsel left the unrecorded sidebar conference with a misunderstanding of what the court meant when attorneys fees were discussed. This good faith misunderstanding cuts against harsh sanctions for the legal error.

Third, plaintiff concedes she has not been substantially prejudiced, and the Court appreciates her candor in her affidavit as well as her frustration at these prolonged proceedings.

Fourth, the court staff made clerical errors in failing to mail certain rulings to counsel, and the docket clerk, who was new on the job, may have unintentionally provided information to counsel which confirmed their misimpression that judgment was not final until it included attorney's fees.

5. Post-Script.

The Court cannot resist pointing out that regardless of the merits of the action and appeal, the City of Fall River did not show similar largesse to Ms. Scott-Harris when she sought to continue employment with the City, and when she attempted to retract a letter of resignation which had mistakenly been sent out by a secretary. Had defendants not held to the technicalities and exercised their discretion more justly, they might not be before the Court now.

ORDER

For the foregoing reasons, the Court **ALLOWS** defendants' motions to reopen the time for appeal pursuant to Fed. R. App. P. 4(a)(6) (Docket Nos. 113, 117, and 120).

The Court **DENIES** the defendants' motions (1) to confirm that plaintiff's motions for attorney's fees were to be treated as a motion to alter or amend (Docket No. 110); (2) to vacate any final judgment and order with

respect to plaintiff's motion for attorney's fees pursuant to Fed. R. Civ. P. 60(b)(6) and reenter the same (Docket Nos. 112, 116, and 119); and (3) to enter an amended judgment pursuant to Fed. R. Civ. P. 58 and provide notice of that entry pursuant to Fed. R. Civ. P. 77 (Docket No. 111).

This Order was entered on August 14, 1995.

/s/ Patti B. Saris
PATTI B. SARIS
United States
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS,

Plaintiff,

CIVIL ACTION
NO. 91-12057-PBS

v.

CITY OF FALL RIVER,
DANIEL E. BOGAN, and
MARILYN RODERICK,

Defendants.

JUDGMENT ON ATTORNEYS FEES

SARIS, D.J.

August 14, 1995

Pursuant to Fed. R. Civ. P. 54(d)(2)(C) and 58, and the Court's endorsements granting #79, motion of plaintiff for attorneys fees and costs in the amount \$79,229.45; granting #81, supplemental motion of plaintiff for attorneys fees in the amount of \$1,206.25; and granting #97, second supplemental motion of plaintiff for attorneys fees in the amount \$2,744.00, IT IS HEREBY ORDERED:

ATTORNEYS FEES AND COSTS ARE AWARDED TO THE PLAINTIFF, JANET SCOTT-HARRIS, in the total amount of EIGHTY-THREE THOUSAND ONE HUNDRED SEVENTY-NINE DOLLARS AND SEVENTY CENTS (\$83,179.70) against the defendants City of Fall River, Marilyn Roderick and Daniel E. Bogan, jointly and severally.

The current rate of post-judgment interest is 5.70% per annum.

/s/ Patti B. Saris
UNITED STATES
DISTRICT JUDGE

9112057.jgm

[Entered on docket
8/14/95. DW]

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS)	
)	NO. 91-12057-PBS
Plaintiff)	
v.)	
CITY OF FALL RIVER,)	
DANIEL E. BOGAN, AND)	
MARILYN RODERICK)	
Defendants)	

NOTICE OF APPEAL

The Defendant, **City of Fall River**, hereby appeals from the Judgment entered June 6, 1994, the denial of its Motion for Judgment Notwithstanding the Verdict, and from the Judgment on Attorneys Fees entered August 14, 1995.

City of Fall River
by it [sic] attorney,
/s/ Stephen C. Fulton
Stephen C. Fulton
LAW OFFICES OF
BRUCE R. FOX
200 State Street
Boston, MA 02109
617-439-4777

[Certificate of service omitted in printing.]

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS,)	NO. 91-12057-PBS
PLAINTIFF)	
VS.)	
CITY OF FALL RIVER, DANIEL)	
E. BOGAN, AND MARILYN)	
RODERICK,)	
DEFENDANTS)	

NOTICE OF APPEAL

The Defendant, Marilyn Roderick, individually, hereby appeals to the United States Court of Appeals for the First Circuit from the Judgment entered June 6, 1994, the denial of her Motion for Judgment Notwithstanding the Verdict, and from the Judgment on Attorney's Fees entered August 14, 1995.

Marilyn Roderick,
by her attorney,
/s/ Bruce A. Assad
Bruce A. Assad, Esquire
10 Purchase Street
P.O. Box 1268
Fall River, MA 02722-1268
(508) 673-2004
BBO# 022980

DATED: August 21, 1995

[Certificate of service omitted in printing.]

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS,

Plaintiff

C.A. NO.
91-12057-PBS

VS.

CITY OF FALL RIVER,
MASSACHUSETTS, DANIEL E.
BOGAN, Individually, MARILYN
RODERICK, Individually,

Defendants

**DEFENDANT, DANIEL E. BOGAN'S,
NOTICE OF APPEAL**

The Defendant, Daniel E. Bogan, hereby appeals from the Judgment entered June 6, 1994, the denial of its Motion for Judgment Notwithstanding the Verdict, and from the Judgment on Attorneys Fees entered August 14, 1995.

DANIEL E. BOGAN,
Defendant,
By his attorney,

DATED: August 22, 1995

/s/ Robert J. Marchand
Robert J. Marchand,
Esquire
DRISCOLL, MARCHAND &
BOYER
206 Winter Street,
P.O. Box 2527
Fall River, MA 02722
(508) 672-8652

[Certificate of service omitted in printing.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JANET SCOTT-HARRIS)

Plaintiff)

v.)

CITY OF FALL RIVER,)
MASSACHUSETTS; et. al.)

Defendants)

CA NO. 91-12057 PBS

NOTICE OF APPEAL

The plaintiff, Janet Scott-Harris, appeals to the United States Court of Appeals for the First Circuit from The Memorandum and Order of the District Court dated August 11, 1995 and from the Orders dated August 14, 1995 allowing the motions of the defendants City of Fall River, Marilyn Roderick and Daniel E. Bogan to Reopen the Time for appeal Pursuant to Fed. R. App. P. 4(a)(6).

Janet Scott-Harris, plaintiff
By her attorneys,

/s/ Harvey A. Schwartz
HARVEY A. SCHWARTZ
Schwartz, Shaw & Griffith
205 Portland Street
Boston, Massachusetts 02114
(617) 227-2414
BBO # 448080

[Certificate of service omitted in printing.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1950

215

JANET SCOTT-HARRIS,
Plaintiff, Appellee,

v.

CITY OF FALL RIVER,
Defendant, Appellant.

95-1951

JANET SCOTT-HARRIS,
Plaintiff, Appellee,

v.

CITY OF FALL RIVER, ET AL.,
Defendants, Appellees,

MARILYN RODERICK, INDIVIDUALLY AND IN
HER OFFICIAL CAPACITY AS A MEMBER OF
THE FALL RIVER CITY COUNCIL,
Defendant, Appellant.

95-1952

JANET SCOTT-HARRIS,
Plaintiff, Appellee,

v.

CITY OF FALL RIVER, ET AL.,
Defendants, Appellees,

DANIEL E. BOGAN,
Defendant, Appellant.

ORDER OF THE COURT

Entered: September 27, 1995

Upon consideration of appellants joint motion,

It is ordered that the above captioned appeals be
consolidated for the purpose of briefing and argument

By The Court

FRANCIS P. SCIGLIANO, Clerk

By: JANICE M O'NEIL
Chief Deputy Clerk

[cc: Messrs. Fulton, Schwartz, Assad and Marchand]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1950

JANET SCOTT-HARRIS,
Plaintiff, Appellee,

v.

CITY OF FALL RIVER,
Defendant, Appellant.

No. 95-1951

JANET SCOTT-HARRIS,
Plaintiff, Appellee,

v.

CITY OF FALL RIVER,
Defendants, Appellees,

MARILYN RODERICK,
Appellant.

No. 95-1952

JANET SCOTT-HARRIS,
Plaintiff, Appellee,

v.

CITY OF FALL RIVER, et al.,
Defendant, Appellee,

DANIEL E. BOGAN,
Defendant, Appellant.

No. 95-2100

JANET SCOTT-HARRIS,
Plaintiff, Appellant,

v.

CITY OF FALL RIVER, MASSACHUSETTS,
Defendant, Appellee.

218

ORDER OF COURT

Entered: June 18, 1996

Upon consideration of the motions filed in the above captioned cases by the Defendants-Appellants, City of Fall River,

It is ordered that said appeals be and the same hereby are consolidated for the purpose of briefing and argument.

It is further ordered that the City of Fall River and related parties be allowed to file one consolidated appellant's brief consisting of 100 (one hundred) pages exclusive of the table of contents, citation, addendum, etc. The time for filing said brief shall be enlarged to and including July 26, 1996.

By the Court:

WILLIAM H. NG
Clerk

[cc: Messrs. Schwartz, Fulton, Assad, Marchand]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

* * *

[p. 8-40] CHARGE TO THE JURY BY SARIS, D. J.

THE COURT: The jury should stay standing. Everyone else may be seated.

There is an old tradition that at this stage in the proceedings the judge stands and faces the jury and the jury stands and faces the judge. This is the way that we symbolize the important role that we both play in this process.

It's been my job to empanel a fair and impartial jury. I've watched you over the course of the last week and a half. You've paid attention, you've taken notes. I thank you for that.

My second job, as I mentioned, was to rule on evidentiary objections. That job is now over. We did that during the course of the trial before you came and after you left.

My third and final task is to give you the instructions of law. You must follow those instructions whether you agree with them or not.

To the extent I say something different from what the attorneys said, you must follow what I say. You should not unduly emphasize one portion or minimize another portion. Sometimes I repeat a section of the instructions, either because I get a confused look on your face or because [p. 8-41] I want to make sure you get it down correctly.

I almost feel the need to apologize after I've listened to four such eloquent closing arguments. A lot of what I

will be doing will be reading. And that's to make sure that you get the law accurately as given to us by the Congress and the Supreme Court.

Now, my job, as I'm sure you will now all agree, is the easy one. Because we stand and face you, I stand and face you, we all stand when you come in, because you are the judges of the facts in this case. You're the ones who decide which witnesses to believe and which witnesses not to believe. You decide what the reasonable inferences are to draw from the evidence. You assess the credibility of the witnesses, not any of us.

As I mentioned to you at the start of the case, "verdict" is Latin. It comes from the Latin which means to speak the truth. And that's what I will ask you to do as part of your deliberative process.

Now this jury charge is divided into three portions. And don't worry, we don't stand for all of them.

The first portion is very general and it's basically the same as that preliminary set of jury instructions that I gave you when you were brand-new walking into this building a week and a half ago.

The second portion is very specific to that special [p. 8-42] verdict form I gave you. I'll help you answer those questions by giving you the legal standards you must follow in answering those questions.

The third and final portion of the charge, which is very brief, is telling you a little bit about the mechanics of the deliberative process, how to go about it, and talks to you a little bit about selecting a foreperson and what those jobs are.

Now, I have to apologize in advance. We do not give you a transcript of the charge. Some judges type the whole thing and it looks great. I don't do that. I have a little of it here, and a little of it here, and a little of it here. I often will look at you to get a sense of whether you are understanding it or not.

So you will not have a fixed copy of my charge to go back with you into that jury room.

You do have notebooks and I'll repeat certain portions to make sure you get it down. I'll give you a tape recording of what I say. In that way you can go back through it if there are any questions.

And, finally, you know, I've been working with these attorneys now over the course of a couple of days to get this accurately to you. You can ask me questions. Send me back a note and say: We don't get this. Please explain the law.

[p. 8-43] The one thing I will never do if you send me back a question is, I'll never tell you what my view of the evidence is, because it's irrelevant. It's your view that counts.

So why don't we get seated and get going here.

Now, I'm starting on the first section of the charge, which is the general portion about the role of the jury and fact-finding.

As I mentioned, and I can't state strenuously enough, you're the only ones to determine the credibility of the witnesses.

During the course of this trial there have been extremely sad moments, there have been happy, even funnier moments. Different things have happened in the courtroom. Nothing that I have done or said, whether in questioning attorneys or in facial expressions, is in any way meant to indicate my views about the credibility of a witness or the truthfulness of a response.

Now, over the course of time you may have seen facial gestures or movements from the attorneys or from people in the courtroom. None of that should influence your view of the credibility of the witnesses. You and you alone looked at that witness stand and you're the one to decide the credibility of the witnesses.

Also, it's your recollection of the evidence which [p. 8-44] controls in this case. You've taken notes. You have memories. It's your collective memory that counts.

So that while you have just heard very powerful closing arguments from the attorneys, your memory of the evidence may differ from their memory. They're doing the best they can. They were working hard over the last week and a half. But it's your memory that controls. They weren't trying to mislead you in any way. If you find that their memory was inaccurate, it's just that your memory is the one here that controls.

You should not consider anything that I say in these instructions as evidence. If you find anything I say misstates the evidence, you should disregard what I say as well.

You should not consider any answers that I struck from the record in considering what the truth is in this case.

I want to stress that I did on occasion ask questions of witnesses. Sometimes it was because if I was confused, I thought maybe you were confused. But it wasn't in any way meant to indicate whether I thought some witness was telling the truth or not telling the truth or was credible or not credible.

Over the course of the trial it's been the duty of the attorneys on each side of this case to object when the [p. 8-45] other side offered testimony or other evidence which the attorney believed was not properly admissible. Given the large number of attorneys in this case, you actually had a very small number of objections. The attorneys did it whenever they felt that the evidence was admissible or inadmissible and I would exclude inadmissible evidence. But you should never hold it against the attorney because I didn't agree with their legal basis for an objection. That's their job to make the objection and you shouldn't hold it against the attorney or the party for making one.

Now, as you remember, you took several oaths here. You took an oath when I asked you questions, when I was empaneling you way back when, a week ago Monday. You took another oath when you became the members of the jury. And the oath that you took and the answers that you made were to render judgment impartially and fairly without prejudice or sympathy and without fear, solely upon the evidence in the case and the applicable law.

Remeber [sic], I asked you a large series of questions as to whether or not you had a bias or a prejudice. I tried to describe to you a little bit about what the case was about. And you're the ones who said you could sit fairly and impartially in this case. A lot of other people didn't say that. You saw them come up and they were gone. You are the jurors in this case that took the oath.

[p. 8-46] There were a lot of moments in this case that were extremely sad on both sides. Now, I certainly felt it and perhaps you did as well. But the case cannot be decided based on sympathy. It's got to be based on your rational analysis of the law as applied to the facts as you find them.

So you need to take the law as I give it to you and apply them to the facts and the burden as you find them, according to the burdens of proof as I give them to you.

Let me go through again what is and is not evidence in this case.

Evidence is the sworn testimony of the witnesses who took an oath to tell the truth, the whole truth and nothing but the truth. The exhibits that were received in evidence and will come with you into the jury room.

By contrast, let me go through this. You now heard many, many questions where the attorney asked a question and the witness said: No, that wasn't the way it is. You should never consider the information in the question as evidence in the case unless there's other evidence that supports it or unless the witness says: Yes, that's the way it is.

Testimony that I struck or excluded or that came in after I sustained an objection should not be considered by you. Occasionally, I allowed in testimony for a limited [p. 8-47] purpose by considering a witness' state of mind, but perhaps it was hearsay, and I said you couldn't consider it for the truth of it.

I want to remind you of all those instructions and to follow them.

The opening statements of attorneys, the closing arguments of attorneys, my instructions are not evidence and nothing that I said during the empanelment process is evidence. Only the testimony of witnesses and the exhibits that come with you into the jury room.

I want to remind you that there are two kinds of evidence that you can consider in this case. There is direct evidence and circumstantial evidence. I went through those at the beginning of this trial.

Direct evidence is direct proof of facts from someone who has seen something or heard something or touched something, or smelled something, or somehow used their senses, their perceptory senses in perceiving an event. And your job is to decide if you agree with that person or not.

Circumstantial evidence is proof of facts from which you may reasonably infer or conclude that other facts exist.

You can consider both kinds of evidence and you're going to need to consider both kinds of evidence in this case. There's direct evidence and circumstantial evidence.

[p. 8-48] You may remember the example that I gave you in this case of the mailman, which obviously had nothing to do with this case. I should say mailperson. Which is whether or not the letter courier, your daughter saw the letter courier deliver the mail to your house and the only question is whether your daughter perceived it correctly, as opposed to whether the mail was shoved through the slot. And you can reasonably [sic] infer whether or not it was shoved through by your letter courier or not and whether it was under all the circumstances of the case your regular letter courier, or whether that person was sick or on vacation.

I like to use that example, again, because it shows that what's reasonable to infer or conclude depends on all the circumstances of the case.

And just like you are the exclusive fact-finders, you're the ones to decide what is reasonable to infer from the facts in this case.

Let me talk to you for a minute about the burden of proof. You may remember a week and a half ago I reminded you that this was a civil case, not a criminal case.

The issues here must be proven by a fair preponderance of the evidence. Put the issue of proof beyond a reasonable doubt out of your mind. Proof beyond a reasonable doubt is not the burden in a civil case. It is the burden in a criminal case. The standard here is the [p. 8-49] plaintiff must prove that her claims are more likely true than not true.

A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a claim has been proved by a preponderance of the evidence, you may consider all of the testimony of all of the witnesses, regardless of whether that witness was called by the plaintiff or the defendant, and all of the relevant exhibits, no matter who introduced those exhibits.

If you find that the credible evidence on a given issue is evenly divided between the parties, by which I mean that it is equally probable that one side is right, as it is that the other side is right, then you must decide that issue against the party having the burden of proof here, the plaintiff. That is because the plaintiff, who has the burden of proof, must prove more than simple equality of the evidence. She must prove each element at issue by a fair preponderance of the evidence.

On the other hand, the party with the burden of proof need prove no more than a preponderance.

So as I remind you, because it's the way I think about it, is the scales of justice in each hand. Plaintiff must make those scales tip, albeit slightly, in her favor. [p. 8-50] But, if at the end of the case, you find that the scales are evenly balanced, the plaintiff has not met her burden of proof.

Now, we talk about witness credibility here. And as I've said – you probably don't want to hear it anymore – it is totally up to you to decide which witnesses are credible and which witnesses aren't.

And there are a number of common sense factors that you will use in deciding the credibility of a witness.

You should consider – and just listing some of them – any bias or hostility the witness may have shown for or against any party, as well as any interest the witness may have in the outcome of the case.

You should consider the opportunity of the witness to see, hear and know the things about which he or she is testifying. The accuracy of his or her memory, his or her candor or lack of candor, his or her intelligence, the reasonableness and probability of the testimony and its consistency or lack of consistency and its corroboration or lack of corroboration with other credible testimony.

In other words, what you just do is to size up a witness in light of the demeanor [sic] on the stand, the explanations given, and all the other evidence in the case.

Now, I wanted to mention to you briefly that you have heard on several occasions that a certain witness said [p. 8-51] something here and then there's a claim that they said something inconsistent at a prior point in time. Sometimes that came up in the context of these depositions or in an interrogatory answer, or it may have been just some pretrial statement.

To the extent a pretrial statement was made by a party to this litigation, and you have the parties listed there, obviously with the City of Fall River, it would be an agent of the City of Fall River, you can consider that for the truth of the matter stated therein.

However, to the extent it was simply of a witness, you cannot consider a prior inconsistent statement by the

witness of the truth of the matter asserted therein. What that prior inconsistent statement was presented to you for is for an evaluation of the credibility of the witness.

Evidence of a prior inconsistent statement of a witness must not be considered by you as affirmative evidence in determining liability. Evidence of a prior inconsistent statement was placed before you for the more limited purpose of helping you to decide whether to believe the testimony of the witness who contradicted himself or herself. If you find that the witness made an earlier statement that conflicts with his or her trial testimony, you may consider that fact in deciding how much of his or her trial testimony, if any, to believe.

[p. 8-52] And, similarly, if you find there was a prior consistent statement, that is, not as well for determining liability, in this case, the prior consistent statement was presented to you for an evaluation of the witness' credibility.

Now, at this point what I'm going to do is I am moving on to the specific claims in this case. And I'd ask you to make sure you have the special verdict form here, because I will be going through this with you.

Let me just give you an overview of this special verdict form before I get going on the instructions.

As you will notice, there are three defendants that you're going to have to answer questions about. The first is the City of Fall River, the second is Ms. Roderick, and the third is Mr. Bogan.

The first one is the City of Fall River, and those are Questions 1 through 4. If you answer those questions

"Yes," then you have to go on to decide the issues with respect to Ms. Roderick and Mr. Bogan.

However, if you've answered those questions "No," and I'll go through exactly how that sequence works later on, you need not and should not go on to answer the questions about Ms. Roderick and Mr. Bogan.

So that's why we start off with the City of Fall River. And I'll talk to you in a minute about that and then [p. 8-53] go on to the other two defendants.

Now, we have here the final section, which is damages, which is subdivided into compensatory damages and punitive damages. I reached the issues of damages, and I will in these instructions, in case you reach the issue of damages. But you should never infer from the fact that I'm reaching the issue of damages that you need to reach it. I only give you one global charge so that you can go up there and deliberate. I don't give charges in piecemeal segments.

All right. Now, what I'm going to do is first start off with an overview of what Ms. Scott-Harris' claims are in the case and the claims that she has to prove by a fair preponderance of the evidence.

Ms. Scott-Harris claims that her rights were violated in two ways. And those two ways are reflected in Question 1 and Question 2. Excuse me. One and 2 are one of the ways, and Question 3 is the other way.

First she claims that her position as Administrator, Department of Health and Human Services, was eliminated with the city government because she is black. And

that issue is the one that is governed by Questions 1 and 2.

A federal civil rights law prohibits local governments and persons acting under color of state law from depriving another person of any rights secured by the [p. 8-54] constitution or federal law. Here the right is not to be discriminated against in employment based on race.

Her second claim is the following, and it is reflected in Question 3: Ms. Scott-Harris claims that her office was eliminated because she spoke out concerning racist statements made by a city employee and because she initiated proceedings in the city government to discipline the woman who made those statements.

The same federal civil rights act which I just referred to also prohibits the city government and persons acting under color of law from punishing or retaliating against Ms. Scott-Harris because of her protected speech.

These are the two claims made by Ms. Scott-Harris, that her position was eliminated because of her race and because of her speech.

If you find that any one of these claims are violations of constitutional rights has been proven, then you must find for the plaintiff. If you find that she has not proven either of these claims, then you must find for the defendant.

Now, I'll go through these claims in much greater detail right now.

Let me start off with the statutes that we're talking about. What is the civil rights law that I'm referring to?

[p. 8-55] The law to be applied in this case is the federal civil rights law which provides a remedy to individuals who have been deprived of their constitutional rights under color of state law. That statute is 42 U. S. - United States Code, Section 1983. And I'll read it to you. You don't need to get this down because I'm going to be going through in detail what the individual elements that plaintiff must prove are.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the" person and "party injured in an action at law, suit in equity, or other proper proceeding for redress." That is basically the statute.

Let me go through the individual elements that she must prove and I'll repeat those so you can get that down in the context of this case.

To establish a claim under 1983, which is the civil rights law that I've just read, Ms. Scott-Harris must establish by a preponderance of the evidence each of the following elements. In other words, she must prove that each of the following elements is more likely true than not [p. 8-56] true.

First, that the conduct complained of was committed by a person acting under color of state law. First, that the conduct complained of was committed by a person acting under color of state law.

Second, that this conduct deprived Ms. Scott-Harris of rights, privileges or immunities secured by the Constitution or laws of the United States. Second, that this conduct deprived the plaintiff, Ms. Scott-Harris, of rights, privileges or immunities secured by the Constitution or laws of the United States.

And, third, that the defendants' acts were the proximate – let me spell that – p-r-o-x-i-m-a-t-e – cause of the injuries and consequent damages sustained by Ms. Scott-Harris. Third, let me repeat, that the defendants' acts were the proximate cause of the injuries and consequent damages sustained by Ms. Scott-Harris.

Let me say, I will sometimes refer generically to defendant, but, of course, there are three separate defendants here, as I mentioned before. So that you must make a separate determination under the law with respect to each one separately.

Whether or not any of the defendants committed the acts alleged by Ms. Scott-Harris is a question of fact for you as the jury to decide. And I'll tell you in a moment [p. 8-57] how to go about deciding that, what legal standards to apply. But, for a minute, just assuming that the defendant or a defendant did commit those acts, I want to instruct you that both Ms. Roderick and Mr. Bogan were officials of the City of Fall River at the time of the acts in question. Therefore, they were acting under color of state law.

In other words, as a matter of law, both Ms. Roderick and Mr. Bogan were officials acting under color of state law, because they were officials in the city government.

Now, let me talk to you for a minute about the City of Fall River. The Supreme Court of the United States has held that a city, a municipality, here, the City of Fall River, may be liable for the actions of officials who are final policy-makers. Here, the final policy-makers are the Mayor and the City Councilors. So when I am referring to the City in any part of this charge, and specifically in Questions 1 through 4, which are the questions dealing with the City, I am referring to the Mayor and the majority of the City Councilors who are the ones who made the decision to eliminate the position in this case. So when I refer to the City of Fall River – of course, that's an amorphous entity here – what I have to be doing is referring to the final policy-makers, here, the Mayor and the majority of the City Councilors.

[p. 8-58] All right. So now I dealt with the first prong which is were there officials acting under color of state law.

So the next issue is what is the federal right involved here?

The plaintiff, Ms. Scott-Harris, is alleging that the defendants, each of the defendants, deprived her of her right to be free from discrimination based upon race as guaranteed by the Fourteenth Amendment to the United States Constitution.

The Fourteenth Amendment states in pertinent part: "No state shall deny to any person within its jurisdiction the equal protection of the laws."

Under the civil rights law and the United States Constitution, it is an unlawful employment practice for

any employer to discharge or eliminate a person's position because of such individual's race.

Ms. Scott-Harris bears the burden of proving by a preponderance of the evidence that the City of Fall River intentionally discriminated [sic] against [sic] her because of her race. In other words, that she has been the victim of intentional race discrimination.

The plaintiff, Ms. Scott-Harris, does not have to present direct evidence of discriminatory motive in order to prevail. Remember, I gave you that distinction between [p. 8-59] direct evidence and circumstantial evidence. She does not have to produce direct evidence of discriminatory motive in order to prevail.

The law often obligates a fact finder to inquire into a person's state of mind. You may consider circumstantial evidence in determining whether or not the plaintiff has met her burden with respect to the motives of the City of Fall River and the individual defendants.

Ms. Scott-Harris can rely on circumstantial evidence sufficient to create an inference of racial motivation. Absent direct evidence of discrimination, our Supreme Court has set forth an order for the presentation of proof in actions where a plaintiff, like Ms. Scott-Harris, claims discriminatory treatment. This involves a burden shifting which you must understand to get to the critical and ultimate question here, which is whether Ms. Scott-Harris has proven intentional discrimination.

The plaintiff must first establish by a preponderance of the evidence a prima facie case of racial discrimination.

Now, *prima facie* is the Latin term which essentially means threshold case.

So the plaintiff must first establish by preponderance of the evidence the following threshold case of racial discrimination. And it has four pieces to it and I'm going to read it so you can get it down.

[p. 8-60] First, Ms. Scott-Harris must prove, one, that she is black. I won't repeat that.

Two, that she was qualified for the position of Administrator and adequately performed her job. Two, that she was qualified for the position of Administrator and adequately performed her job.

Three, that her position was terminated. Three, that her position was terminated.

Four, that the employer sought or appointed or designated someone to perform substantially the same work after she left or, alternatively, that white persons were retained in similar positions. Let me repeat that. Four, that the employer sought or appointed or designated someone to perform substantially the same work after she left or, alternatively, that white persons were retained in similar positions.

Here, the City of Fall River does not contest that Ms. Scott-Harris is black, that her position was terminated or that she was qualified for the job and adequately performing it. They do contest the plaintiff has proven the fourth prong.

Once Ms. Scott-Harris has proven by a preponderance of the evidence a prima facie case, this threshold case that I just set forth for you, the City of Fall River

bears the burden of articulating a legitimate non-discriminatory reason [p. 8-61] for the elimination of the position.

Here, the City of Fall River has articulated as its legitimate nondiscriminatory reason that it terminated Ms. Scott-Harris' position for budgetary reasons.

All right. Now, let's move to the ultimate burden which you're going to have to answer.

Now plaintiff has the ultimate burden of proving by a fair preponderance of the evidence that the reason articulated by the City of Fall River was not the true reason for the employment decision and that the real reason for the discharge was intentional racial discrimination.

These two issues are the ones that are addressed by Questions 1 and 2 on your verdict form.

The critical - well, your disbelief of reasons put forward by the City of Fall River - and that's up to you - particularly if disbelief is accompanied by a suspicion of untruthfulness - one again, that determination is up to you - made together with the elements of the prima facie case, which I just gave to you, suffice to show intentional discrimination. Thus, if you reject the City of Fall River's reasons, this would permit you to infer the ultimate fact of intentional discrimination if plaintiff has proven her prima facie case - those first four things - without additional proof of discrimination. However, you are not required to make such a finding.

[p. 8-62] The critical determination for you is whether Ms. Scott-Harris has proven by a fair preponderance of

the evidence that an impermissible consideration, race, was the substantial motivating factor in the elimination of her position.

The ultimate burden is one for the plaintiff to show not merely that the impermissible factor of race entered into the decision to terminate her position, but that it was determinative, that but for her race the position would not have been eliminated.

It is not the City of Fall River's business judgment that is at issue here, but, rather, the City's motivation.

The Civil Rights laws do not protect against all poor or unfair treatment in the workplace. They protect against discriminatory [sic] treatment.

Now, I'm going to move on to the allegation regarding the First Amendment, and that is Question 3.

One of the federal rights which Ms. Scott-Harris alleges, which the city of Fall River and the individual defendants deprived her of, was her right to freedom of speech under the First Amendment to the Constitution of the United States.

Specifically, the plaintiff alleges that while she was a public employee working for the City of Fall River, [p. 8-63] she engaged in one or more specific acts of speech or expression protected by the free speech clause of the First Amendment. That the City of Fall River, acting through its Mayor and City Council, then took specific action to eliminate the position which the plaintiff held and the plaintiff's acts or speech was a substantial or motivating factor in the decision of the City Council and Mayor of the City of Fall River to take such action.

Let me talk to you for a minute about the First Amendment. The Supreme Court has clearly established that the City of Fall River, any city, may not eliminate the position of an employee on a basis that infringes that employee's Constitutionally protected interest and freedom of speech.

Employees of a public agency may not have their positions eliminated for speaking out on issues of public concern. Even though Ms. Scott-Harris did not have an employment contract and even though she served at the pleasure of the Mayor, her position may not be eliminated because she exercised her Constitutional right of freedom of expression or in retaliation for such exercise of her protected speech.

In order to prove her allegation against the defendants, the plaintiff must establish each of the following two elements as to each defendant:

[p. 8-64] First, that her acts of speech or expression were protected by the free speech clause of the First Amendment.

And, second, that these acts of speech were a substantial or motivating factor in the decision of the City Council and Mayor of the City of Fall River to amend the City Ordinance eliminating the position of Administrator, Health and Human Services.

That is essentially the burden which I've set forth for you in Question No. 3.

The plaintiff alleges that while employed by the City of Fall River as Administrator of Health and Human Services she made statements condemning racism and

instituted disciplinary proceedings against a city employee for making racial comments.

I am telling you and ruling as a matter of law that if, in fact, you find that she did make such statements, the free speech clause of the First Amendment does protect that speech.

The second element of the plaintiff's claim is that her protected speech or act of expression was a substantial or motivating factor in the decision of the Mayor and City Council to eliminate the position which she held.

The plaintiff's protected speech was a substantial or motivating factor in the decision to eliminate the position which the plaintiff held if it played a substantial [p. 8-65] part in the actual decision to eliminate the position of Administrator of Health and Human Services.

You may find that the defendants acted against the plaintiff solely because of the plaintiff's exercise of her free speech rights.

If based on the evidence you make that finding that Ms. Scott-Harris' protected speech was a substantial or motivating factor in the City's decision - wait, I did that wrong. Let me start that again.

You may find, based on the evidence, that the defendants acted against the plaintiff solely because of the plaintiff's exercise of her free speech rights. If so, if you find that was a substantial and motivating factor, you must find the plaintiff's protected speech was a substantial or motivating factor in the defendants' discharge.

On the other hand, you may find that the defendants acted against the plaintiff for many different reasons. If

so, then you must determine whether one of those reasons was the plaintiff's exercise of her free speech rights. If it was one of the many reasons, then you must determine whether or not it played a substantial part in the actual decision to take action against the plaintiff. If it did play a substantial part, then you must find the plaintiff's protected speech was a substantial or motivating factor in the decision.

[p. 8-66] If it did not play a substantial part, you must find that the plaintiff's protected speech was not a substantial or motivating factor in the defendants' decision.

So, in other words, you have to make that decision with respect to Question 3.

Now, what is Question 4?

You heard that term because I just used it. Did Ms. Scott-Harris prove that the elimination of her position by the City of Fall River, the Mayor and the City Councilors, proximately caused her any injuries?

What does that term "proximate cause" mean? You'll notice I used that term in Question 4 and in subsequent questions.

The defendants' actions are the legal cause of the plaintiff's injuries if it is a substantial factor in bringing about the harm. Therefore, you must determine whether the actions of this defendant - I mention that because there are three different defendants - are a substantial factor in causing the plaintiff's injury.

You may consider the following elements in your determination: One, the number of other factors which contributed in producing the harm and the extent of the

effect which they had in producing it. Two, whether the defendant's conduct continued to be an active force in every [p. 8-67] instant up to the time of the harm. And, three, the amount of time which lapsed between the defendant's action and the plaintiff's harm.

It does not matter whether other concurrent causes contributed to the plaintiff's injuries so long as you find that the defendant's actions were a substantial factor in producing them.

If defendant's actions were a substantial factor, then they were the legal cause or what we call the proximate cause.

In order to prove proximate causation, the plaintiff is required to show that there was a greater likelihood of a probability that the harm complained of was due to causes for which the defendant was responsible than from any other cause.

However, the plaintiff is not required to eliminate entirely all possibility that the defendant's conduct was not a cause. It is enough if she introduces evidence from which you as reasonable men and women may conclude that it is more probable that the injury was caused by the defendant or defendants than that it was not.

All right. So now I have addressed Questions 1 through 4.

If you have answered both Questions 2, 3 and 4 "No," then you need not answer any other questions.

[p. 8-68] If you've answered Question 4 "Yes" - in other words, you've gone through the proximate causation analysis - you need to answer a set of questions with

respect to Marilyn Roderick and a set of questions with respect to Daniel Bogan.

Those questions I will not separately charge you on because they essentially track the same standards that I just gave you for the City of Fall River. In other words, Question 5 deals with whether or not you find that Ms. Scott-Harris has proven that Ms. Roderick voted to approve an amendment of city ordinances which would have the effect of eliminating the position of Administrator of Health and Human Services with the intent to terminate Ms. Scott-Harris' employment because she is black. That's that intentional racial discrimination that I went through with you.

The second one is whether or not Ms. Scott-Harris has proven that her Constitutionally protected speech was a substantial or motivating factor in the vote of Ms. Roderick favoring amendment of the City Ordinance having the effect of eliminating the position of the Administrator of Health and Human Services. I've set forth the standards in the question.

And, finally, whether or not if you've answered 5 and/or 6 "Yes," whether or not her, Ms. Roderick's, actions [p. 8-69] were the proximate cause of the elimination of the position. In other words, whether or not they were a substantial factor in causing the elimination of the position.

The same questions, almost identically, except with the name of Mr. Bogan, are asked in 8, 9 and 10.

Now, if you have answered [sic] affirmatively to Question 4, or to Question 4 and Questions 7 and 10, you

need to address the issue of damages. And, once again, I am giving you the issue of damages because I give you one charge at one time.

If you return a verdict for the plaintiff, then you must award her such sum of money as you believe will fairly and justly compensate her for any injury you believe she actually sustained as a direct consequence of the conduct of the particular - of the defendants or defendant.

You shall award actual damages only for those injuries which you find that the plaintiff has proven by a preponderance of the evidence. You should not engage in any speculation or conjecture. You shall award actual damages only for those injuries which you find the plaintiff has proven by a preponderance of the evidence to have been the result of the conduct of the defendant in violation of Section 1983.

Here, the plaintiff is seeking essentially three types of compensatory damages. Actually, one of the most [p. 8-70] frequent questions I get is: Well, how do I figure out damages? Well, that's why we have you here, is to use your common sense and good judgment. And we have no precise formula. I am simply going to tell you the areas that you must consider and it's up to you to decide what would be fair compensation for those - or fair amount of damages.

The first area that plaintiff is seeking as damages are what we call special damages, which means those damages that can be easily quantified in terms of dollars. Those include items such as lost wages.

General damages are more difficult to reduce to a specific dollar amount. And the general damages include injuries such as emotional distress.

So first are the special damages. In other words, the kind that can be quantified easily in terms of - I'll go through those with you. Second is an area of emotional distress.

And thirdly, plaintiff is seeking punitive damages in addition to the actual damages suffered by the plaintiff.

The plaintiff is entitled to the income she lost as a result of defendants' conduct. In computing the amount of the plaintiff's lost income you should consider the period in which she received no income, and also any difference between her income when she found work and what her income had been while she was employed by the City. And you should [p. 8-71] also determine the duration of the difference in income.

She seeks additional expenses that she was required to pay as a result of her new employment. In other words, she's seeking certain commuting expenses that resulted from having to commute from Fall River to Boston.

There is no request here for future lost wages.

Now, with respect to general damages. In addition to her actual money damages, she is entitled to compensation for any emotional distress or embarrassment as a result of any violation of her Constitutional rights. Emotional distress refers to mental anguish, mental suffering, mental disturbance, humiliation, nervous shock, distress of mind or anxiety.

You should determine an amount of money that will fully compensate the plaintiff for her personal humiliation and emotional distress. And you may make that decision even though the assessment will be by nature imprecise.

Now, the third area involves the request for punitive damages. And, actually, before I get to that, you will note that in Question No. 3 I ask you to write down both the dollar amount and to write it out in words, and that's just to make sure that everybody is in agreement with exactly what that figure is.

Now, the issue of punitive damages, if you award the plaintiff actual damages - and, by the way, you do have [p. 8-72] the option, if you find that plaintiff's civil rights were violated, to award what's known as nominal damages, minimal damages, if you find that her rights were violated but she didn't suffer any actual injuries that are compensable as a result of it.

But let me move on, now, to the area of punitive damages. If you award the plaintiff actual damages, then you may also make a separate and additional award of exemplary or punitive damages against any or all of the individual defendants.

You may not impose punitive damages against the City of Fall River. As a matter of law, a jury cannot assess or anybody cannot assess punitive damages against a municipality. So, as you'll notice, these questions only refer to Ms. Roderick and Mr. Bogan.

You may also make an award of punitive damages even though you find the plaintiff has failed to establish

actual damages. So that even if you find that there are only nominal damages, you can still award punitive damages.

Punitive damages are awarded in your discretion. It's up to you to punish a defendant for extreme or outrageous conduct or to deter or prevent a defendant and others like them from committing such conduct in the future.

Where a plaintiff in a civil rights case establishes the element of malice or callous and reckless [p. 8-73] indifference by preponderance of the evidence, then a jury is allowed in its discretion to assess punitive damages against the defendant for the purpose of punishing the defendant and also for the purpose of deterring others.

An act is maliciously done if it is prompted by ill will or spite towards the injured person. An act or failure to act is reckless if done in reckless or callous disregard of or indifference to the rights of the injured person.

The plaintiff has the burden of proving by a preponderance of the evidence that the defendant acted maliciously or recklessly with regard to her rights.

And that's why you'll notice under the punitive damage section there are two separate questions. One is with respect to the standards for imposing punitive damages, and the second is as to the amount.

Punitive damages are awarded in your discretion, as I mentioned. In deciding whether to award the punitive damages, you should consider whether the defendant may be adequately punished by an actual award of compensatory damages or whether the conduct was so

extreme and outrageous that actual damages are inadequate to punish the wrongful conduct.

You should also consider whether actual damages standing alone are likely to deter or prevent the defendant from again performing any wrongful act he or she may have [p. 8-74] performed or whether punitive damages are necessary to provide deterrence.

Finally, you should consider whether punitive damages are likely to deter or prevent other persons from performing wrongful acts similar to those defendants may have committed.

Now, in calculating damages, I want to make it clear that there are three things that you should not consider.

First is, don't consider the issue of interest. That's something that I consider.

The second is, don't consider the issue of taxation.

And third, don't consider the issue of attorneys' fees.

Those three areas are totally irrelevant to your determination at this point.

All right. Essentially, that's the end of the verdict form and the end of the middle portion of my instructions.

The third section is with respect to the selection of a foreperson. I leave that, in most cases, up to the jury. So that should be your first act when you get upstairs.

I want to say that each one of your questions has [p. 8-75] to be answered unanimously. We do not exclude any alternates so all of you will go up and deliberate.

Whoever you choose has certain obligations to me and let me list those. They're administrative obligations, rather than substantive ones. In other words, the foreperson isn't more equal than the rest. He or she just has certain obligations to the Court.

The first is that the foreperson is the one who fills in the verdict form. And as you notice, that foreperson must certify to me that it is a hundred percent of the jurors who either vote yes or vote no or who agree on a damage figure. That is what – it's got to be unanimous.

Second is, that the foreperson is the one who will communicate with me. In other words, I don't want notes from all sorts of different people on different issues. If there is a legal question, the foreperson will sign the form and date it, put a time down, hand it to – you'll notice we now have a court officer here, who is going to protect your deliberative process – hand it to him and he'll get it to me. I confer with the attorneys.

As I mentioned, I'm happy to clarify any legal questions that you have. And often I find if there's a logjam or a point of indecision, just a legal question will sometimes help.

I won't answer any factual questions because your [p. 8-76] memory is just as good as mine, probably better, because you have a group of you deciding it.

The third obligation of the foreperson is when a verdict is reached, you're the one who stands up and announces it in Court.

Now, whoever it is, is not the person who's standing alone, because, as I said, it's a unanimous verdict. And

you'll hear our clerk here say: So say you Madam or Mr. Foreperson? So say you all members of the jury? So all of you are standing there. But he or she will be the one who actually announces the verdict in Court.

So those are essentially the obligations of the jury foreperson.

I have never been on a jury. I've never been called for jury duty and I know – remember those peremptorial challenges. I'd be the first one out of there. But I have the luxury of speaking to jurors after most trials, especially where the jury wants to speak to me.

I just want to give you some sense of how to approach this deliberative process. These are extremely difficult cases. I mean, you've seen it. People care a lot about these cases. And sometimes I am required to decide these kinds of issues by myself. And I would give anything, anything, for other people to bounce my ideas off of. Because, just by being human, you've sat here for the last [p. 8-77] week and a half, you must have some instincts about what you think that the correct result of this trial is. But they're tough, tough issues.

So the way to walk into this is, of course, with your human instincts as to what's fair and just, but with an open mind, just saying: Well, what do you think? And with a willingness to change if you think the other person's approach is more reasonable.

The way not to walk in is: I know what I'm going to do. No one is going to budge me. And sit there like some stubborn person, as if there's only one true and just result. That's the wrong way to approach it.

Walk in there with an open mind, willing to listen to what other people have to say.

On the other hand, each one of you were chosen by these attorneys because you had a unique contribution to this process. You really do represent every different age group of men and women from every different corner of this state. You represent occupations. You represent who we are in the State of Massachusetts. So that nobody here should view their views as less important than another person's views. And you shouldn't just change your mind because you're sick of being here in Federal Court or it's a gorgeous spring day outside or you're just basically just sick of the whole thing. It's just too important. So make [p. 8-78] sure if you change your mind, you do it because you're persuaded, that you think that the other result is fairer. And if you approach it that way, that is the way we found for 800 or more years that the jury system is supposed to work. And it's not a perfect system. It's the best way we now have.

Don't ask any questions of my staff to the extent they're upstairs with you. I know that there have been cases that have been reversed because people on the Court staff have improperly talked to jurors about cases. So they're put in a position of being rude to you in not being able to talk about it.

Any questions about the case must be put down in writing and sent to me.

That's different than logistical issues, like "When are we getting lunch?" Or "What can we have?" Of course you can talk to them about those kinds of things.

As I mentioned, we will now have a court officer. I'm protecting your process. And he'll be the person who will make sure that no one interferes in any way with that process.

As I understand it, we will have lunch at about one o'clock. I don't care if you have a working lunch. But I do care if you bring your exhibits into the lunchroom. Because they're what we've got. In many cases, they're the [p. 8-79] originals. I can't risk having a can of Coke or mustard or whatever it happens to be all over those exhibits. So that to the extent that you're eating, don't bring the exhibits with you.

Now, what I'm going to do right now is I need to talk to the attorneys for a second. We actually spent a couple of hours yesterday going through the charge and it's sort of been an ongoing process as this case has continued.

As I mentioned, I don't just have a form charge because I like to explain it as I go along. It may be that I read something wrong or it may be that I thought I was explaining something clearly and I wasn't. Or that something came into an attorney's mind that might need clarification. Or simply that they may want to object to what I said.

So what I need to do is bring the attorneys up here and rather than send you up and have to bring you back again, I find this is more efficient, because I think I know what they're going to say. And what you can do is just stand and stretch while I talk to them and then I can send you upstairs to do your work.

(CONFERENCE AT THE BENCH AS FOLLOWS:

MR. SCHWARTZ: Content.

MR. FULTON: A couple of points. Just on the [p. 8-80] fourth prong, you mentioned the two alternative [sic]. One was that someone was thought to do the same work. It's not a big deal, but I think to be really correct it should be someone who is not black, a white person. That is what this is all about.

THE COURT: I'm not sure that that's right. I took it right out of - I would be reluctant to tamper with it at this point.

MR. FULTON: The other thing for me, you might want to mention there is no need that they must state they're - [loud noise] when they make a decision.

THE COURT: No, but every jury made has taken their lunch. I will not comment on that.

MR. ASSAD: Judge, the information on the verdict slip as it presents to Bogan and Roderick as to what a substantial fact would be in and of themselves. However, they could do it - it may not be a substantial factor unless they act in concert with others, such as Roderick would have had to have spoken with other City Councilors, she can't be -

THE COURT: I didn't give that instruction ever.

MR. FULTON: I think we all have been saying that in that directed verdict motion.

THE COURT: That is part of the directed verdict question of law. I would be reluctant to tamper with

the [p. 8-81] proximate cause instruction. I said they can't find against these folks unless they find against the City of Fall River. I would be reluctant [sic] to tamper with it.

Anything from you?

MR. MARCHAND: No.

THE COURT: I think that is your directed verdict issue. But I don't know how I can instruct them on proximate causation other than the standard that I gave, that they have to be a substantial factor in causing it. All right?

Fine. I'm actually not going to do anything here. All right.

... END OF CONFERENCE AT THE BENCH.)

THE COURT: I have nothing more to tell you. It may take a couple of seconds to get the exhibits up to you. They come in - attorneys number them in advance, so that's why they don't come in numerically, you know, 1, 2, 3, 4. I want to make sure that we've got them all to you. But, please, if you think something has been introduced as an exhibit and then you don't see it there, send me a little note and I can doublecheck to make sure that everything is there.

MR. SCHWARTZ: One second?

THE COURT: Yes.

[p. 8-82] (CONFERENCE AT THE BENCH AS FOLLOWS:

MR. SCHWARTZ: You're going to instruct them there are gaps in the numbering. So they shouldn't expect to find all the exhibits.

THE COURT: Fine.

. . . END OF CONFERENCE AT THE BENCH.)

THE COURT: Counsel as a helpful point mentioned that because they numbered them in advance there may be certain exhibits that one side or the other just didn't feel it was appropriate or necessary to introduce. So you may find actual numerical gaps in the numbering of the exhibits. So don't be worried about that. It's more along the lines of you remembered some document coming in and it's not there. I had the attorneys go through it to make sure it's all there, but everyone's human and can make a mistake. So just if you think something should be there and isn't, ask for it. Just so we can doublecheck and make sure that you have everything you're supposed to have.

All right. So at this point what we will do is stand in recess. And one last thing I want to make sure is - we will at some point at around 4:30ish say to you: What do you want to do? We'll probably send you home at about five and have you come back tomorrow. But we're not trying [p. 8-83] to rush you at all. Nothing anyone is saying is trying to have you rush. So please don't take it that way at all. Okay.

(Whereupon the jury left the courtroom at 12:30 p.m.)

(Recess.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Question From The Jury]

[p. 8-84] (1:20 p.m.)

(The following is in the conference room.)

THE COURT: Is everyone content with the exhibits?

MR. FULTON: City of Fall River is content.

MR. MARCHAND: Defendant Bogan is content.

MR. ASSAD: Marilyn Roderick is content.

MR. SCHWARTZ: We're content.

THE COURT: The jury sent down a question earlier which all counsel agreed to and I responded in writing. And was that marked as an exhibit?

THE CLERK: They kept it upstairs and I told them to keep it and not throw it away because we need to attach it to the record.

THE COURT: The second question: Can we have the blowup charts for easier clarification on certain budget issues?

All three defendants protest and object to this vigorously. The plaintiff wants to send it up.

I'm not going to send it up because I think it unduly emphasizes one portion. I will write to the jury if they want the pages the blow-ups come from, I will write them down. I did notice some of them took notes on that. If, in fact, there is some confusion and that's why they wanted the blow-up, as to what pages they came from, I would give them that again.

[p. 8-85] MR. FULTON: I object to allowing the jury to be infomed [sic] as to any pages or having them be allowed to fill in any gaps in any notes they may have taken. And I object to the charts going to the jury, also.

MR. ASSAD: The same for the Defendant, Roderick.

MR. MARCHAND: The same for Bogan.

THE COURT: I will write it down to make sure no one has objection other than the ones that you've stated. What two exhibits were they?

MR. SCHWARTZ: There were four charts that came from two different exhibits, 39A and 40A. One is from 40 and one is from 39. One is from 40A and one is from 39A.

THE CLERK: That is Exhibit 1 from each of the respective budget years '91 and '92.

(The Court writes answer down and shows it to counsel.)

MR. FULTON: I've now read the judge's response and I make the same objection that I did previous.

THE COURT: Basically -

MR. ASSAD: Also for Mrs. Roderick.

MR. SCHWARTZ: I have no objection.

THE COURT: Basically, the response is no. However, if the jury wants the page numbers of the exhibits which those blow-ups came from, you should send me a note.

(Recess.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Question From The Jury]

[p. 8-86] (Whereupon the jury entered the courtroom at 3:07 p.m.)

THE COURT: At least a few of you are still smiling.

I will say that in the five years or so that I've been doing this, you are the most inquisitive jury that I have had in such a short time span. But I don't mean that in any way as criticism. In fact, these are extremely hard issues that you're grabbling [sic] with. And you'll be happy to know or at least know that misery loves company in the sense that the Supreme Court of our country and the Congress of our country has struggled with exactly these kinds of issues.

Let me say, I've talked with the attorneys about your question. For the record, I'll read the question and then I'll tell you the instruction that we all agreed made sense under the law.

So the question reads: "Judge Saris, we are having difficulty interpreting the wording of the first question. As stated, Was not the true reason. Should or may we interpret that as not the sole or only reason or in some other manner? It is a major stumbling block for all of us. Obviously, this first question will set things going forth. Jim McManus."

That is Mr. McManus?

(Juror raises hand.)

[p. 8-87] THE COURT: All right.

I'm not going to reread all my instructions on the first question. I'm only going to tailor it to the question you specifically asked me. Although, if you want me to, you can come back down here and I can read you everything. We have the tape if you want to go through the whole thing. That's why I'm not going to reread it now.

Let me just say the following: Fall River has stated that the only factor in its decision to eliminate the position of Administrator of Health and Human Services was budgetary.

If you find that there was more than one reason for the elimination of that position, you must decide whether the budgetary concern was the substantial motivating factor. If it was the substantial motivating factor, answer "No" to Question 1. If it was not the substantial motivating factor, answer "Yes" to Question 1.

Do you want me to read that one more time? Everyone's got it? All right.

We're awaiting your every word. I'll let you go up. And if you need me to do anything else, I'll be happy to do that.

Actually, before I send them up, I think that reflects what we all talked about.

MR. SCHWARTZ: Yes.

[p. 8-88] MR. ASSAD: Yes.

MR. FULTON: Yes.

MR. MARCHAND: Yes.

THE COURT: Okay, fine.

(Whereupon the jury left the courtroom at 3:11 p.m.)

(Recess.)

[p. 8-89] (Whereupon the jury entered the courtroom at 4:38 p.m.)

THE COURT: You don't even need to be seated. Well - actually, sit down.

I'm going to send you home now. I can see some of you are just ready and eager to go. What I would like to say, as I always say, you can't talk about it tonight, of course, at home. But even tomorrow morning, you probably know by now that a few of you come in bright and early, I see you, and some others straggle in at nine. You can't talk about the case until everybody is in the room at the same time.

The way I proceed is I get word from someone that - you know, either Nancy or Debbie or someone - that you're all here. I bring you in, make sure you're all here, and then send you out to deliberate. The whole process takes 30 seconds. Until I do that, don't talk about the case.

We'll collect your notebooks - we've got them already - and we'll just hand them back out to you tomorrow.

Once again, we will feed you and treat you with tender loving care and the room is yours for as long as you need it. We'll stand in recess.

(Whereupon the jury left the courtroom at 4:40 p.m.)

(Whereupon the Eighth Day of Trial was concluded.)

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Jury Verdict]

* * *

[p. 9-4] (Whereupon the jury entered the courtroom at 3:55 p.m.)

THE CLERK: May I inquire of the jury?

THE COURT: You may.

THE CLERK: Mr. Foreperson or is it madam?

Has the jury agreed on a unanimous verdict, yes or no?

THE FOREPERSON: Yes, we have.

THE CLERK: May I see it please.

(Pause.)

THE CLERK: Mr. Foreperson, would you please remain standing.

Mr. Foreperson, as to the special verdict form regarding City of Fall River Question 1, has Ms. Scott-Harris proven that the reason given by the City of Fall River for the elimination of the position of Administrator, Health and Human Services, was not the true reason? How did the jury answer, yes or no?

THE FOREPERSON: No.

As to Question 3, has Ms. Scott-Harris proven that her protected speech was a substantial or motivating factor in the City's decision to eliminate the position of, Administrator, Health and Human Services? How did the jury answer, yes or no?

THE FOREPERSON: Yes.

THE CLERK: Going to Page 2 of the special verdict [p. 9-5] form. As to Question 4, has Ms. Scott-Harris proven that the elimination of her position by the City of Fall River proximately caused her any injuries? How did the jury answer, yes or no?

THE FOREPERSON: Yes.

THE CLERK: In regards to Marilyn Roderick. Question 5. Has Ms. Scott-Harris proven that Councilwoman Marilyn Roderick voted to approve an amendment of city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services, with the intent to terminate the plaintiff's employment because she is black? How did the jury answer, yes or no?

THE FOREPERSON: No.

THE CLERK: As to Question 6, has Ms. Scott-Harris proven that her constitutionally protected speech was a substantial or motivating factor in the vote of Fall River City Councilwoman Marilyn Roderick favoring amendment of city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services? How did the jury answer, yes or no?

THE FOREPERSON: Yes.

THE CLERK: As to Question 7, has Ms. Scott-Harris proven that the act of Councilwoman Marilyn Roderick in voting favorably toward the amendments was a proximate cause of the elimination of the position of Administrator, Health [p. 9-6] and Human Services? How did the jury answer yes or no?

THE FOREPERSON: Yes.

THE CLERK: Going on to Page 3. Daniel Bogan. As to Question 8, has Ms. Scott-Harris proven that Mayor Bogan recommended an amendment to city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services, with the intent to terminate the plaintiff's employment because she was black? How did the jury answer, yes or no?

THE FOREPERSON: No.

THE CLERK: As to Question 9, has Ms. Scott-Harris proven that her constitutionally protected speech was a substantial or motivating factor in the recommendation by Daniel Bogan, then Mayor, of the amendment of city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services? How did the jury answer, yes or no?

THE FOREPERSON: Yes.

THE CLERK: As to Question 10, if you answered yes to Questions 8 or 9, do you find that the act of Mr. Bogan in recommending the amendment was the proximate cause of the elimination of the position? How did the jury answer, yes or no?

THE FOREPERSON: Yes.

THE CLERK: As to the question of damages, [p. 9-7] compensatory, Question No. 11. If you answered Question 4, 7 or 10 yes, what amount of money will fairly compensate Ms. Scott-Harris for her injuries?

THE FOREPERSON: \$156,000.

THE CLERK: Thank you.

As to Page 4, damages, punitive, Question 12. If you answered Question 7 yes, has Ms. Scott-Harris proven that Ms. Roderick acted maliciously or with reckless indifference to her rights for which punitive damages are warranted? How did the jury answer, yes or no?

THE FOREPERSON: Yes.

THE CLERK: Question 13. If so, what amount of punitive damages do you award?

THE FOREPERSON: \$15,000.

THE CLERK: Question 14. If you answered Question 10 yes, has Ms. Scott-Harris proven that Mr. Bogan acted maliciously or with reckless indifference to her rights for which punitive damages are warranted? How did the jury answer, yes or no?

THE FOREPERSON: Yes.

THE CLERK: Question 15. If so, what amount of punitive damages do you award?

THE FOREPERSON: \$60,000.

THE CLERK: Mr. Foreperson, so say you on your oath that this is the verdict?

[p. 9-8] THE FOREPERSON: Yes.

THE CLERK: And members of the jury?

THE JURY: Yes.

THE COURT: I would like to see the attorneys for one second about one question on the verdict form.

(CONFERENCE AT THE BENCH AS FOLLOWS:

THE COURT: The concern I have is that the plaintiff had requested we divide Question 1 and 2 into two questions. I'm a little worried about the way we worded Question 1, which had solely to do with the question of race, and might be viewed as inconsistent with Question 3.

In other words, what they clearly have found is that the substantial and motivating factor in the elimination of the position of Administrator, Health and Human Services was protected speech. Yet, in Question 1 they've said that their reason was a valid reason. Now, in fairness to the jury - do you see what I'm trying to say, Mr. Schwartz? In other words, when I recharged them it was the substantial motivating factor, they said they didn't prove that the budgetary reasons weren't a substantial motivating -

MR. SCHWARTZ: I don't see any inconsistency.

THE COURT: I'm a little concerned. I think it's fine, but I just don't want this ever to come up later as [p. 9-9] the issue I'm dealing with. They are saying plaintiff hasn't proven the reason given was not the true reason.

MR. SCHWARTZ: Okay.

THE COURT: Since the reason they gave was budgetary, how can No. 3 be true?

MR. ASSAD: Correct.

THE COURT: If you see what I'm trying to say, the way we worded this forced them into this position, and I would like to tell them to go back upstairs, that this

is potentially inconsistent, and I want them to go to Question No. 2. Because if they found it was budgetary and that was the real reason, they can't answer this in this way.

MR. FULTON: I don't want them to go to two again, they can go to three again.

THE COURT: No. They answered this yes, and they still have to go to this one and answer no. Do you see what I'm trying to say?

MR. SCHWARTZ: You want them to answer Question 2?

THE COURT: Right. And I think they also have to decide. I think it is inconsistent if they say yes this was the reason given but it was also for them to come and say it's the First Amendment.

MR. SCHWARTZ: They might have been confused by the answer to the question.

[p. 9-10] THE COURT: But I think we don't want this on appeal, we don't want it. Maybe you want it. But I think I have to ask them to go back and ask them - there is an inconsistency or at least someone can construe it as such.

MR. SCHWARTZ: How do we clarify it?

MR. FULTON: The one thing that is consistent, the racial aspect is out. So why should they go back and -

THE COURT: If you are willing to concede that 1 and 3 is not inconsistent.

What do you want to do, Mr. Schwartz, I have a concern there?

MR. SCHWARTZ: I don't see it as being inconsistent.

THE COURT: If everyone agrees it is not inconsistent.

MR. ASSAD: We definitely see it as inconsistent.

THE COURT: Then I'm going back to them.

MR. ASSAD: As to what issue?

THE COURT: I'm going to say they clearly felt she was retaliated against for the exercise of her First Amendment rights. The way we worded 1 and 2, because I forced them to split it up.

MR. SCHWARTZ: At my request.

THE COURT: They were forced into the position of [p. 9-11] answering the race question in Questions 1 and 2 in a way that could be potentially construed inconsistent with 3.

MR. SCHWARTZ: How can we clear this up, then?

THE COURT: I'm going to tell them to go back and re-answer these. To say you can't say the reason was budgetary and then say the reason was First Amendment.

What they could say, it wasn't race, it was speech.

MR. ASSAD: Not with a "no" on budget. If No. 1 is answered the way it is, it's the end of the case.

THE COURT: They clearly felt something was wrong here given the rest of this verdict form and that would not be reflecting the intent of this jury. To clarify any inconsistency, I'm going to have them come back.

MR. FULTON: And do what?

THE COURT: Say this is an inconsistent verdict, 1 and 3, and tell them to redo it, and then you can save your appellate rights. It's clear, I don't want this going up this way, which it will.

MR. SCHWARTZ: A "no" and a "yes" there are consistent.

THE COURT: Exactly right.

MR. ASSAD: Judge, if I may say, if their reason is "no" for Question 1 and they believe she did not disprove the real reason we did things is budgetary, this case is over.

[p. 9-12] THE COURT: That's right, but I'm not sure they felt that given how they answered the rest of the questionnaire.

MR. SCHWARTZ: They could certainly have found, say, the evidence was even on Question 1 -

THE COURT: No, because if they found a substantial motivating factor was budgetary, they can't answer 3 this way, they can't.

MR. SCHWARTZ: They could have found nothing.

THE COURT: They didn't say that, they said unanimously no.

MR. SCHWARTZ: What they could have found was that she did not prove it was budgetary to answer Question 3 as "yes."

THE COURT: Well, I think what I would like to do is - I don't even know if I have an extra copy of the verdict form.

THE CLERK: Mine is pencilled.

THE COURT: Maybe I should send them upstairs and talk about this a little bit with you about how to handle this appropriately, do you agree with that?

MR. SCHWARTZ: Sure.

... END OF CONFERENCE AT THE BENCH.)

THE COURT: Let me explain a concern I have about a [p. 9-13] potential inconsistency between two answers, and that's Question 1 and Question 3. So what I want to do is talk to the attorneys for a second to make sure this never becomes an issue that is wrong to instruct you to clarify whatever the potential inconsistency is and as soon as I have done that, I will let you clarify this as the jury. I'm sure you have some strong feelings as to how this should come out. Why don't we stand in recess for one second.

(Whereupon the jury left the courtroom at 4:11 p.m.)

THE COURT: Come on up here so we can do this without as much pressure.

(CONFERENCE AT THE BENCH AS FOLLOWS:

MR. SCHWARTZ: Judge, I think we should try to clarify it just so we don't have to deal with it on appeal

so we will at least have a clearer recorded [sic] on appeal. I don't see them being necessarily inconsistent.

THE COURT: Maybe I should leave it where it is.

MR. ASSAD: I ask you on behalf of Ms. Roderick that it be declared an inconsistent verdict.

THE COURT: If it is inconsistent, I will send it back to them.

They feel she was retaliated against based upon a First Amendment exercise of rights - I wouldn't want anyone to argue, which I think none of us foresaw, but which is a [p. 9-14] totally fair way of approaching [sic] this - is the way they answered No. 3.

MR. ASSAD: Judge, if that jury which spent so much time on Question 1 asking you to repeat a jury instruction felt that the City's response was that the reason was budgetary and they spent a great deal of time on that, that that was a clear decision on their part. I'm asking this verdict be thrown out as being inconsistent and a mistrial be declared.

THE COURT: Denied. I'm going to give it back to them.

The only thing is I'm thinking it's possible they can find there are two substantial motivating factors in the decision.

MR. FULTON: The instruction that we agreed to and that you gave in Question 1 was after their Question that you spoke about "the" not "a," the motivating

and substantial cause, and you were very specific about that.

THE COURT: Right.

MR. FULTON: Three talks about "a substantial cause," there is an inconsistency.

MR. SCHWARTZ: But they didn't object to the phrasing.

MR. FULTON: I'm not objecting to 3.

THE COURT: This phrasing comes right out of Mount [p. 9-15] Healthy.

MR. FULTON: To answer 1 "no" based on the instructions that they got, they have to find that the reason we gave was the substantial motivating cause - reason, not cause.

MR. SCHWARTZ: No, they don't have to find that it was. They have to find that she didn't prove that it wasn't.

MR. ASSAD: Since it was not the true reason. It can't get much clearer than that.

MR. FULTON: But we changed the question with your instruction.

MR. MARCHAND: You can't have two substantial motivating factors. One has to govern the other. If she hadn't kicked out our reason for the budget -

MR. ASSAD: That's it.

MR. MARCHAND: She's gone.

MR. SCHWARTZ: They have to make a decision as to whether or not they want to go back.

THE COURT: I'm not going to declare them inconsistent and declare a mistrial.

MR. FULTON: My objection.

MR. ASSAD: Note my objection, your Honor.

MR. MARCHAND: And mine.

THE COURT: Now let's find out in the interest of [p. 9-16] justice to find out what this jury believes. The problem is that there are slightly different standards under the First Amendment and under the way the Title VII standard is applied to 1983 actions are used. Now that we've gotten over and you preserved your objections, what is the fair way with all objections preserved, what is the fair way to preserve the record on this? Maybe Mr. Schwartz has a suggestion.

MR. SCHWARTZ: I would hate to send them back with another question to answer, that's the problem. They didn't answer Question 2. I suppose they would answer that one as "no."

MR. FULTON: I'm against them going anywhere near Question 2 for any reason.

THE COURT: Well, they've clearly said the only reason they didn't answer No. 2 is because they weren't allowed to. In their verdict sheet they marked off two and crossed it off, because they were obviously following what my instructions were

MR. SCHWARTZ: And with the individuals answered "no" to the race question.

THE COURT: They consistently answered "no" with respect to the race question. There's the First Amendment decision. I'm happy to leave it the way it is if you are all happy. Let's go off the record.

[p. 9-17] (Discussion off the record.)

... END OF CONFERENCE AT THE BENCH.)

(Whereupon the jury entered the courtroom at 4:26 p.m.)

THE COURT: Let me tell you about what my concern is, and it's a potential inconsistency that I didn't foresee but as I recharged you, remember, on how to answer Question No. 1 - I would never want this issue to go up on appeal - so to clarify the record, I'm going to ask you to fill in a second special verdict form and let me tell you what my concern is. Remember I told you if Ms. Scott-Harris proved that the substantial motivating factor was not budgetary, then you answer "yes," remember, I used the substantial motivating factor analysis.

For you to answer Question 1 and 3, you said she didn't prove it wasn't budgetary, but then you said she proved it was the First Amendment that was the substantial motivating factor. That is potentially inconsistent. If the reason was budgetary, then how could it be retaliation for the exercise of First Amendment rights? So I want you to go back through this. If the true reason for the elimination of the position was budgetary, then you answer Question 1 "no" - let me strike that.

If she's proven that the reason given by the City [p. 9-18] of Fall River was not the true reason, the answer is "yes," and that would be consistent with Question 3.

If you find that she didn't find that the sole reason was budgetary, and you answered that "no," how can you then say in Question No. 3 that the substantial and motivating factor was retaliation for First Amendment rights? I'm concerned about that potential inconsistency there.

What I want you to do is go back and answer Question 1. Did she prove that the reason given by the City of Fall River was not the true reason? Answer that either "yes" or "no," and you answered it "no," which is fine, if you think the answer is they really did eliminate it for budgetary reasons, that's totally within your realm as the jury to decide that. But then you need to rethink how you answered Question No. 3. You would need to change your answer to Question No. 3.

However, if you think that the real reason wasn't budgetary but retaliation against First Amendment rights, then you need to answer that Question No. 1 "yes" and then move on to Question No. 2, which is did she prove intentional racial discrimination. I'm hoping that I'm being clear as to what the potential inconsistency is. Now, Mr. McManus, you're the foreperson for the jury. What is inconsistent is No. 1 and No. 3.

[p. 9-19] THE FOREPERSON: I understand.

THE COURT: What I'm going to do, I'm going to give you back your original form but don't touch it. I'm going to call this the revised special verdict form so there is a full appellate record. I want you to go back and think about it. Has she proven that the real reason wasn't budgetary? If the answer is yes, then go on to Question 2. If the answer is "yes to Question 2, go on to Question 3.

If, however, you find that the real reason was budgetary, then you can't then answer Question 3 yes.

Does anyone want to see me up here?

MR. FULTON: I do.

(CONFERENCE AT THE BENCH AS FOLLOWS:

THE COURT: I know you are preserving your objection to sending it back. I wanted to make sure I stated it fairly and clearly.

MR. FULTON: Now we have three answers, the real reasons, the true reasons, and the substantial motivating factor.

THE COURT: Well, you all agreed to that. That's basically . . .

MR. FULTON: You're not giving them the real reason, the true reason.

THE COURT: The real and true reason are the exact same things. That's a nit pick.

[p. 9-20] MR. FULTON: No, it isn't.

THE COURT: But the issue with the substantial motivating factor is the recharge we all agreed to.

MR. FULTON: Oh, I agree with that.

THE COURT: I'll incorporate. That's why I incorporated that charge into the recharge. I have given you basically a second bite of this apple. Really, I don't want to be substantively wrong. Did I say anything that is wrong other than my clerk raised I do have the discretion as a judge to send it back, but is there anything substantively that I said wrong?

MR. SCHWARTZ: I'm content.

THE COURT: Okay. He's the one that stands to lose, they could go back and wipe this whole thing out.

MR. SCHWARTZ: I know that.

. . . END OF CONFERENCE AT THE BENCH.)

THE COURT: If you have any questions about what I just said, send me down a note.

(Whereupon the jury left the courtroom at 4:31 p.m.)

[p. 9-21] (The following is in the conference room.)

THE COURT: The jury has asked a question concerning the possible conflict between Question No. 1 and No. 3. I have drafted an answer which everybody agrees is substantively correct although the defendants reserve their rights with respect to my decision to send it back to resolve the potential inconsistency.

My answer is: You must decide whether plaintiff has proven that her protected speech was a substantial or motivating factor in the City's decision to eliminate the position of Administrator of Health and Human Service [sic]. If the budget was the substantial motivating factor in the decision to eliminate the position, you must answer Question 1 "no." If you answer "no," go no further. Sign and date the form.

If speech was the substantial motivating factor in the decision, you must answer Question 1 "yes." Then proceed to Question 2 and the remainder of the verdict form.

Plaintiff preserves his rights in arguing that Question 1 and 3 of the original form are not inconsistent and this

to some extent draws a conflict between the standard in Mount Healthy, which is a substantial motivating factor as opposed to the "but for" standard in Title VII which is picked up in Section 1983, and the phrasing we used came out of the St. Mary's case which are Questions 1 and 2 [p. 9-22] which are the employment discrimination claim [sic].

To resolve any possible concern later on, I in my discretion have decided to send it back to the jury to make it clear what they are doing. Does anybody want to add anything?

MR. SCHWARTZ: I agree with that.

MR. MARCHAND: Agree.

THE COURT: Does anybody disagree?

MR. ASSAD: No.

MR. FULTON: No.

(Recess.)

[p. 9-23] (Whereupon the jury entered the courtroom at 5:19 p.m.)

THE CLERK: Would the members of the jury panel please remain standing.

Mr. Foreman, have you agreed upon a unanimous verdict?

THE FOREPERSON: Yes.

THE CLERK: You may return the verdict.

THE FOREMAN: Do you want both of them?

THE COURT: Yes, definitely.

THE COURT: All right.

THE CLERK: Mr. Foreman and members of the jury, the jury makes the following answers:

Question 1. Has Ms. Scott-Harris proven that the reason given by the City of Fall River for the elimination of the position of Administrator, Health and Human Services was not the true reason? Answer: Yes.

Question 2. Has Ms. Scott-Harris proven that the real reason of the City of Fall River for the elimination of the position of Administrator, Health and Human Services was intentional racial discrimination? Answer: No.

Question 3. Has Ms. Scott-Harris proven that her protected speech was a substantial or motivating factor in the City's decision to eliminate the position of Administrator, Health and Human Services? Answer: Yes.

Question 4. Has Ms. Scott-Harris proven that the [p. 9-24] elimination of her position by the City of Fall River proximately caused her injuries? Answer: Yes.

Question 5. Has Ms. Scott-Harris proven that Councilwoman Marilyn Roderick voted to approve an amendment of city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services with the intent to terminate the plaintiff's employment because she is black? Answer: no.

Question 6. Has Ms. Scott-Harris proven that her constitutionally protected speech was a substantial or motivating factor in the vote of Fall River City Councilwoman Marilyn Roderick favoring amendment of city

ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services? Answer: Yes.

Question 7. Has Ms. Scott-Harris proven that the act of Councilwoman Marilyn Roderick in voting favorably toward the amendments was the proximate cause of the elimination of the position? Answer: Yes.

Question 8. Has Ms. Scott-Harris proven that Mayor Bogan recommended an amendment to city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services, with the intent to terminate the plaintiff's employment because she is black? Answer: No.

[p. 9-25] Question 9. Has Ms. Scott-Harris proven that her constitutionally protected speech was a substantial or motivating factor in the recommendation by Daniel Bogan, then mayor, of the amendment of city ordinances which would have the effect of eliminating the position of Administrator, Health and Human Services? Answer: Yes.

Question 10. If you answered yes to Question 8 or 9, do you find that the act of Mr. Bogan in recommending the amendment was the proximate cause of the elimination of the position? Answer: Yes.

Question 11. If you answered Question 4, 7 or 10 yes, what amount of money will fairly compensate Ms. Scott-Harris for her injuries? Answer: \$156,000.

Question 12. If you answered Question 7 yes, has Ms. Scott-Harris proven that Ms. Roderick acted maliciously or with reckless indifference to rights for which punitive damages are warranted? Answer: Yes.

Question 13. If so, what amount of punitive damages do you award? Answer: \$15,000.

Question 14. If you answered Question 10 yes, has Ms. Scott-Harris proven that Mr. Bogan acted maliciously or with reckless indifference to her rights for which punitive damages are warranted? Answer: Yes.

Question 15. If so, what amount of punitive damages do you award? Answer: \$60,000.

[p. 9-26] So say you Mr. Foreman and all members of the jury?

THE JURORS: Yes.

THE COURT: All right. You've worked hard and I thank you very much for your service. You can now talk about the case with whomever you want to talk about the case. However, there are certain people who are in the press that are interested and have the right to get your name and address. The attorneys and the parties should not contact you. You have a right to say no to the press and you have a right to say yes in the press. There has been coverage in the Fall River area but not really up here. So I don't know. But the parties and the counsel should not get in touch with you unless they do it under my auspices, so I want you to know that.

You can certainly talk with anyone about the case. A lot of you probably went into this with very candid feelings of your belief on things. I want you to remember that it is important that you protect the confidentiality of your deliberative process.

I also make it a practice to go upstairs and personally thank you. It is 5:25. I asked you to go back upstairs. But

for those of you who would need to go, I won't be insulted. For those of you who should want to speak with me, I will be glad to speak with you, and we will now stand in recess.

[p. 9-27] (Whereupon the jury left the Courtroom at 5:25 p.m.)

THE COURT: I will see counsel on the record for one second.

(CONFERENCE AT THE BENCH AS FOLLOWS:

THE COURT: A couple of things. There was some question with what I did with respect to the question of directed verdict. I can't remember what I did. I know I allowed it with respect to Mr. Connors. What I can't remember is whether I reserved on it or whether I denied it without prejudice. But for the record, whichever approach I took I will resolve in post-judgment motions the issues with respect to the claim of legislative immunity and the claim of proximate cause i.e. whether there was enough evidence to go to the jury on the majority of the City Councilors' voting. I can't remember which tack I took, but for your rights I want to protect it.

As to post-judgment. You need to get me some amounts on attorneys fees. When can you do that?

MR. SCHWARTZ: The end of next week.

THE COURT: Could another week do it for you to decide whether you want a hearing?

MR. FULTON: Sure.

THE COURT: I will give you another week after that. Then we can enter judgment and you can file the

[p. 9-28] appropriate post-judgment motions. I just want to make it clear as to how we are to proceed and I want to make sure your rights are protected.

MR. FULTON: That's what my concern was.

THE COURT: Anything else?

MR. ASSAD: I want to renew my motion for a mistrial at this time.

THE COURT: On the inconsistencies?

MR. ASSAD: Yes.

THE COURT: I understand that. But I think at this point, and I think it was clear all along what they were trying to say. I just didn't want - there are enough serious legal questions without there being that inconsistency floating around. Now I think it is clear what they were doing.

. . . END OF CONFERENCE AT THE BENCH.)

(Whereupon the trial was concluded.)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JANET L. SCOTT-HARRIS

V.

CITY OF FALL RIVER, ET AL

Civil Action
No. 91-12057-PBS

Courtroom No. 6
Federal Building
Boston, MA 02109
2:15 p.m., Thursday
September 29, 1994

Before: THE HONORABLE PATTI B. SARIS, District
Judge

Hearing

Marie L. Cloonan
Federal Court Reporter
1690 U.S.P.O. & Courthouse
Boston, MA 02109 - 426-7086
Mechanical Steno - Transcript by Computer

APPEARANCES:

Schwartz, Shaw & Griffith, (by Harvey Schwartz,
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Street, Boston, MA 02114, on behalf of the Plaintiff.

Long, Racicot & Bourgeois (by Stephen C. Fulton,
Esq.), 200 State Street, Boston, MA 02109, on behalf
of the Defendant, City of Fall River.

Driscoll, Marchand & Boyer (by Robert Marchand,
Esq.), 206 Winter Street, Fall River, MA 02722, on
behalf of the Defendant, Daniel Bogan.

Bruce Assad, Esquire, 10 Purchase Street, Fall
River, MA 02720, on behalf of the Defendants,
Marilyn Roderick and John L. Connors.

[p. 3] THE CLERK: The Court calls Janet Scott-
Harris v. City of Fall River, 91-12057.

THE COURT: Good afternoon. All my old
friends are here.

MR. FULTON: Hello, Judge.

THE COURT: It's been a while. State your
names.

MR. ASSAD: Bruce Assad, your Honor, repre-
senting Marilyn Roderick.

MR. FULTON: Stephen Fulton. I represent the
defendant, City of Fall River.

MR. MARCHAND: Robert Marchand, repre-
senting Daniel Bogan, the defendant.

MR. SCHWARTZ: Harvey Schwartz, for the
plaintiff.

THE COURT: Now, I have read all the motions
and I think it was a combination of a lot of people's
vacation plans over the summer which postponed it now
until September. I apologize for that. It's just every time
we tried to find a date, someone couldn't do it.

THE CLERK: It was our schedule, too.

THE COURT: Our schedule as well, I think,
because of the cases we had over the summer. It's a

combination of all our schedules, and I meant myself, as well, included.

Here we are in September and the issue is going to be whether or not I should grant a JNOV or a Motion for a New Trial.

[p. 4] I have read all the pleadings. And I wanted to start with you all and ask – who would like to take the lead on this?

MR. ASSAD: I would, your Honor.

THE COURT: All right.

MR. ASSAD: Did you have questions, Judge, or do you want us to make a presentation? You mentioned, I thought, that you had questions for us or –

THE COURT: Yes.

I understand you are preserving for the record the issue of legislative immunity. But I believe the First Circuit – you're actually asking me to change First Circuit law on the subject. I understand you're preserving it so you can go up there and ask them to change.

MR. ASSAD: Judge, I would go one step further than that. If you take a look at the jury slip that was initially brought to you, in terms of what this jury had felt about whether or not Janet Scott-Harris was able to prove that the true reason for the city, being the budget, was that true or false, when they responded, Judge, they responded that she failed to prove her case and that the city's statement that it was a budgetary cut was in effect.

THE COURT: Excuse me, wait, wait. That's another issue all together.

You urged me prior to trial to find as a matter of [p. 5] law, regardless of the facts, of what the jury said –

MR. ASSAD: That's correct.

THE COURT: – that there was legislative immunity.

MR. ASSAD: That's correct.

THE COURT: But you agreed it was a fact dispute under First Circuit law, but you were telling me that the First Circuit was against the weight of the authority in the other circuits and you were essentially just preserving that issue.

MR. ASSAD: That's correct.

THE COURT: So on that issue, I'm assuming you are just doing the same thing again.

MR. ASSAD: Judge, we are preserving the issue. But it does go a step further. I think we now fit within the First Circuit cases.

THE COURT: Listen, on that verdict slip, we all agreed, all of us, we sat back there in that room and we all agreed that is how it should go in, there were going to be the first two questions on the Title VII issue and the next on the First Amendment issue. We all agreed that under St. Mary's we had to ask these questions in a certain way and then we had to ask them in a different way because it's phrased differently under Mount Healthy for the First Amendment. Right?

When it came back, there was an inconsistent [p. 6] verdict.

MR. ASSAD: Correct.

THE COURT: I instructed them without objection on your part that I was instructing them inaccurately, that it was inconsistent. You objected to my sending it back at all.

MR. ASSAD: That's correct.

THE COURT: But you didn't say the instruction of law was wrong. You all agreed it was inconsistent. That was my memory. I sent them back and put it both ways. It's either they have not proven it, in which all of these answers have to be no, or you can answer that they have not proven that it was - that they have proven it wasn't budget, but they haven't proved it was race; and then I allowed them to go on to the next question.

You may disagree that I should have sent it back, but everyone agreed it was an inconsistent verdict.

MR. ASSAD: That's correct, Judge.

THE COURT: That's right.

So I was a little taken with the arguments that I had to follow the first verdict slip since everyone agreed that both sets of answers couldn't be right.

MR. ASSAD: That is correct.

THE COURT: So? When I sent it back, they clarified it and here I am. I think there are some great [p. 7] constitutional issues here, but that's not one of them.

MR. ASSAD: Judge, our feeling was and I stand to be corrected - my understanding was we felt, at least for the defense attorneys, that after that first question, we

took a look at the fact it was inconsistent. We took a look at the question, itself. If, in fact, this jury says this is a budgetary reason, this case is over.

THE COURT: But we said it was inconsistent. We said just that, if it's budgetary, it's over. If it's not, then go on and answer the other questions.

MR. ASSAD: That opens up a whole new area of why they would have rendered a verdict in favor of Janet Scott-Harris with respect to money damages.

What that reason was, was the fact that they felt sympathy toward Janet Scott-Harris. They disliked Daniel Bogan, they disliked Marilyn Roderick, none of which is relevant to the case. The case stands, Judge, as you correctly instructed the jury. They must have found the majority of the city councilors -

THE COURT: I agree that's moving to where I think the tough question is.

MR. ASSAD: All right. We'll talk about that.

THE COURT: That's where I'm going to press Mr. Schwartz hard and that's where I think the issue is.

The question is, in my mind, legislative immunity [p. 8] as an absolute immunity is out as to First Circuit law.

The question is: Was there enough evidence in this record from which the jury could find that retaliation for exercise of First Amendment rights was a substantial or the motivating factor in the decision of the City of Fall River defined as the mayor and a majority of the city council.

MR. ASSAD: Fine.

THE COURT: I don't think anyone had a legal question as to how I sent it to them.

MR. ASSAD: No.

THE COURT: I don't remember that, anyway. I think we all agreed on that. But there was a serious disagreement about whether there was enough evidence from which the majority of the city council - you could conclude that from a majority of the city council. That's what I want to hear about today.

I reread your papers. And I understand that it's fair game to preserve your point on legislative immunity. I think I'm bound by First Circuit law. I think there is a recent case in the last couple of months on this reaffirming that position and I'm just going to stay with it.

But let me ask you this -

MR. ASSAD: Yes.

THE COURT: - if I can play the devil's advocate a little bit. In fact, I think there was enough evidence from [p. 9] which a jury could find that Mr. Bogan and Ms. Roderick were impermissibly motivated on the First Amendment issue. At least I'm not going to change the jury verdict on this. Drawing all evidence in favor of the plaintiff, there was enough there.

But the tough issue is: Is that enough from which you can infer something about the majority of the city council?

But let me ask you this. These aren't just crazies off on the fringe of a city council. These aren't like one city

councilor spouting racism, an improper thing. This was the mayor and the chairman of the ordinance subcommittee. Am I correct? And the vice chair of the city council?

MR. ASSAD: That's correct.

THE COURT: Given that and the newspaper coverage that we read about and the fact that at least one councilor called her and said, "What's going on here?" is that enough from which I can infer that they knew the issues and they voted accordingly?

I'm going to push it the other way for Mr. Schwartz. That's really the tough issue here.

MR. ASSAD: Judge, in the City of Fall River, you have nine city councilors elected at large. The fact that you get [sic] are able to get any two to agree on a lunch time is a real coup for anyone.

[p. 10] Each one was an individual. The fact that you may be president of the city council or you may be a vice president of the city council has no bearing on influence within that city council whatsoever. All it means is who conducts the meeting and who speaks last at a city council meeting. That is it in the City of Fall River.

With respect to this case, Judge, unless I tell you today who the members of the city council are that voted against the keeping of that position, unless you read the first complaint, Judge, you don't know who they are. They weren't even mentioned.

As a matter of fact, the only names that were mentioned were Michael Plaskey [sic] in passing, and John Alberto. Absolutely no evidence as to those two. And the only other councilor was Raymond Mitchell. And it was

mentioned by Marilyn Roderick that she had a conversation with him and that's it.

Judge, for all this jury knew, you could have been a member of the city council that voted on this issue. There was absolutely no evidence

THE COURT: Right now, I don't think I could get elected to anything in Fall River.

MR. ASSAD: Neither would I, Judge.

But, your Honor, in this particular case, they had no idea who they were talking about, whether they were male, [p. 11] female, black, white or yellow, no idea whatsoever.

In fact, Judge, if you take a look at the original complaint, I believe they have listed as defendants John Mitchell, Michael Plaskey [sic], John Alberto, Leo Pelletier.

And if you notice on the record, Judge, not even the plaintiff believed they had a shred of evidence against them because they voluntarily dismissed all of them prior to trial. You heard not one shred of evidence about any of them during trial.

As a matter of fact, Janet Scott-Harris testified that she had absolutely no knowledge that Marilyn Roderick or Bob Connors or Dan Bogan talked to any city councilor about the elimination of her position or the elimination of the department itself, nor did you hear her say that she had any evidence, any personal knowledge, that Marilyn Roderick, Dan Bogan or Bob Connors interfered with the disciplinary proceeding with respect to one, Dorothy Biltcliffe, and that was supported by Sharon Skales [sic], who

also testified here at trial. So what you have is an absolute void as to what was in the mind of anybody other than Marilyn Roderick, Dan Bogan and Bob Connors. And Bob Connors didn't even get to the jury.

THE COURT: Well, that's right.

MR. ASSAD: You have absolutely no information about anyone else. And to make the leap, to say that these [p. 12] people felt the same way as you would say Marilyn Roderick would have felt or Dan Bogan would have felt, looking at the evidence in the absolute best light to the plaintiff, is a pretty broad stroke, Judge, and it is a statement that all councilors think alike, all councilors would be, in effect, in this particular instance, morally corrupt. And I don't think the Court can do that.

I know the jury didn't have any information as to these people. The jury didn't even know their names on the majority of the city council, let alone what was their substantial or motivating factor in their vote.

THE COURT: Do you have any case law that would even be on point on this?

MR. ASSAD: Judge, you know, I defer to my brother if there's anything. I don't know of any case law that says if there is an absolute void in the evidence, how do you make the leap? There is nothing. They don't even know the names, Judge.

THE COURT: I'm going to ask Mr. Schwartz. They do know that there was a swirling controversy around this woman, because we heard it was in the press.

MR. ASSAD: Judge, that's correct. The date, when they had the meeting, there was a controversy, there was a - I don't know about a swirling controversy.

THE COURT: She said she was crying, she was [p. 13] irritable, her kid was embarrassed at school. What I don't know and I'm not sure about were any press articles introduced into evidence or discussed that would at least bring this controversy to the councilors' attention?

MR. FULTON: What you're talking about, your Honor, if I can interrupt, there were none in evidence. All those articles she discussed was after this had happened.

THE COURT: I didn't remember the timing. I was going to ask about that.

MR. ASSAD: Those were the statements, Judge, she related to. I asked her about the article of Sean Flynn and Mike Mello. Those were subsequent to the vote.

THE COURT: All right.

MR. ASSAD: Judge, I don't know if you want me to get into what our feeling is about the inconsistent jury form.

THE COURT: Yes, I would, a little bit. We all agreed it was inconsistent. I think part of it was our fault because we instructed them, the first two questions were the St. Mary's question on Title 7 and the next question was the Mount Healthy question. And I think none of us saw the potential for them answering it in an inconsistent way.

You know, it is all of our fault, but it happened. And I think it would have been error not to have sent it [p. 14] back. Am I wrong that the correct thing to do about an inconsistent verdict is to send it back and tell them to do something about it?

MR. ASSAD: Or to grant a new trial, Judge.

Judge, this jury, if you recall, the first day you sent it out, I think, the first comment you said to them, "Don't make any determination as to why Bob Connors is not in here." We weren't out the door when they had their first question, "Why wasn't Bob Connors in here?"

THE COURT: Right.

MR. ASSAD: Then, a little later on, they sent you a question. And the question related to the first question, they were having difficulty, they were talking and thinking about the first question. They were trying to come to a conclusion before they went on. I think they might have even sent two questions on that first day, Judge. But I stand corrected. We weren't able to get the reporter at this time.

THE COURT: I understand. You probably read in the press we're doing a pretty major trial. There is a lot of daily copy going on.

MR. ASSAD: Absolutely, yes.

But, Judge, they spent a good long time on that issue. What happened when they came back with the inconsistent verdict that they did come back with, you [p. 15] recharged them. They went out and the first thing they did, Judge, is they sent another question down to us, asking us, "Why do we have to change our answer in the first question?"

And, Judge, they believed that it was a budgetary situation. They believed that Janet Scott-Harris didn't prove otherwise in this Court.

What they did, when we sent back a written instruction back to them, within five minutes, they were down saying that they had to do either one or the other. They changed it within five minutes. They walked down and presented it to this Court.

Your Honor, it was an inconsistent jury verdict. It's absolutely a classic case for a new trial. This jury, at that point in time, I question as to what was going through their minds when they changed that slip in five minutes, something that took them hours over a two-day period, to figure out in Question No. 1.

THE COURT: I can assure you I'm not going on that. But the bigger question, the more important question, I'm going to turn to Mr. Schwartz, unless the two of you do you have anything you wanted to add?

MR. FULTON: I'll just say a few things, your Honor.

Mr. Assad has stolen all my thunder.

MR. SCHWARTZ: Not for the first time.

[p. 16] MR. FULTON: Not for the first time is right.

I think you have the issue, and it deals with this majority thing, and I won't belabor the point, but I don't think there is enough, even as to Bogan, that he knew who this Dorothy Biltcliffe was and then, afterwards, he brought back Mrs. Biltcliffe before her full suspension had been served.

But the key is whether he initiated all this renovation to the city government for the purpose of eliminating Janet Scott-Harris.

What it comes down to, he knew who Mrs. Biltcliffe was; even Mrs. Scott-Harris had no problem with Bogan, and he had no problem with her.

How we get from there to both a verdict against the city and punitive damages against Mr. Bogan, I have no idea. But you asked for some case law, and I'll just give you this case.

This deals with a racial discrimination case and we're now talking about a First Amendment case. This dealt with examining the motives of certain members of a board who voted one way. Pildich [sic], P-i-l-d-i-t-c-h, v. City of Chicago, 3 F.3rd, Page 1113, Seventh Circuit, 1993.

I have not been able to find any case which very clearly on point says that where an action is taken by a major [sic] and a city council there has to be, you know, inquiry [p. 17] into the motives of a majority of the city council, but that is going to be our position in this case, even though there may not be any decision out there that's reported.

THE COURT: Because, and I'll go to Mr. Schwartz in a minute - he's at the edge of his chair - there really was almost no evidence at all to suggest what was in the minds of the majority of the city council. So the question in which you raise whether or not it was the fact it was the mayor and the vice chair of the city council is enough to make it a substantial and motivating factor. That's the legal question.

MR. FULTON: That's right. Is that enough? The identity of the two that the jury did not like, is that enough to impute that motive over to all the others who we know nothing about?

THE COURT: That's the difficult question.

MR. FULTON: That's what it is.

THE COURT: Okay.

MR. FULTON: And we say you can't do that. And I imagine they will say you can.

THE COURT: Mr. Marchand, is there anything you wanted to add?

MR. MARCHAND: Do I have six minutes, Judge? That's my usual standard, now that these guys have stolen my thunder.

[p. 18] If, in fact, Danny Bogan is the mayor and makes a decision that he made to revamp the city budget, part of that was his action against Scott-Harris up until that point in time.

The plaintiff, really hasn't proven anything against Dan Bogan. The first contact with Bogan comes when he makes this decision in January of 1991. He became the mayor in December, December 21st. And now we start going off on tangents on the budget as to what he's doing.

Mr. Schwartz would have us believe that's an independent action strictly against her, which would allow him to get to the legislative immunity. I'll leave that out.

He made an umbrella decision to do a financial where-withall with the City of Fall River which took place. Up to that, it's not too bad.

THE COURT: In fairness, Mr. Connors put together a list and she is not on it. He made the choice to add her. That's a very specific choice.

MR. MARCHAND: Without objection, without testimony against it, Mr. Bogan and Mr. Connors both testified as to why this contractual person had to be let go before the end of the fiscal year.

THE COURT: I agree there is another side to it, drawing all inferences to him. It was an individualized action. How did it get here?

[p. 19] MR. MARCHAND: How did it get there?

Bogan got to be mayor. He said: Look, you know there's going to be less dough. This is where I'm going to start. I've got to get rid of Scott-Harris in this particular manner.

Mr. Schwartz would have us believe he could have fired her. He could have fired her for just cause. He could not fire her. She was an excellent employee. He said that many times under oath. But that was part of the entire conspiracy action. In and of itself, that is not malicious. There was no evidence to support any maliciousness on Mr. Bogan's part.

Now, we bring in Biltcliffe, Biltcliffe, who he knew maybe ten years ago on a particular advisory board. Mr. Schwartz used the word "strong advisory board." That is a different story. He was on a board with her one time ten

years before this. He testified he knew her and he knew her husband.

Mr. Schwartz would have you believe that there was a certain political connection in the City of Fall River between Mr. Bogan and Tom Norton, the state senator who wrote the letter. Now, maybe that's where the maliciousness comes in. Tom Norton is supposed to know what Danny Bogan told him.

He doesn't write to Danny Bogan. He writes to Bob [p. 20] Connors. Bob Connors is supposed to be the glue. That's what Mr. Schwartz said in his opening. Bob Connors was the glue to put all this conspiracy together. What did he do with Bob Connors? He kicked him out.

What did Bogan do when he got the letter? Did he kick her out right away? No. A month after he got it, he brought her back early. That's it. That's what Bogan did.

There's nothing else. No stories. He did his function as the mayor, as the chief administration officer of a municipality or a town or a state, as you do in your courtroom.

There is no evidence, as counsel said, Mr. Assad said, Mr. Fulton, getting back with rage, with names. No evidence that Bogan went to any city councilor.

That's the issue you've got. That's your job. What evidence was presented, what evidence was presented - who's supposed to present it, Judge? A simple question. Who's supposed to present it? The plaintiff.

What did they put on it? Nothing.

What's the best evidence? Nothing happened between Bogan and the city council.

Who dismissed the case against the remaining city councilors? The plaintiff.

What does that mean? I know what it is. I know what I want you to think it means. There's no case because [p. 21] there was nothing.

Now, if there's nothing and he brought him in initially and he kicked them out because he had no case, he still has no case. He can't prove a connection. He can't prove a nexus. He couldn't do it directly, when he had them. He could have brought them in. He's the plaintiff. He's supposed to prove the case.

THE COURT: He could have brought who in?

MR. MARCHAND: The people he brought as initial defendants, the remaining city councilors.

THE COURT: Okay.

MR. MARCHAND: I hate to use the TV term, "quantum leap," but he wants to use a quantum leap theory to nail them.

THE COURT: All right. I heard all these theories.

You don't disagree as a matter of law because I think everyone agrees that it had to be the mayor and the majority of the city council. At least you didn't object to the jury instruction.

MR. SCHWARTZ: I know, I know. And we kept looking at this as - at least I kept looking at this as a Title VII case with a First Amendment tail to it. What we're left with is the tail. That's where this Acevido [sic] case, this

recent First Circuit decision that I cited in my memo, I thought it was really fascinating, where the First Circuit [p. 22] says: Well, here's the standard of proof of Title VII and here's the standard of proof under the First Amendment.

That's our case. I mean, if we really wanted to confuse the jury, we would have given them both instructions as to who has what burden under the First Amendment [sic] and who has what burden under Title VII. Then they would have really been confused, because, as the First Circuit said, they're very, very different burdens. They're still arguing the Title VII burden here. They're saying I have to prove something.

THE COURT: Well, you do.

MR. SCHWARTZ: Well, under Mount Healthy and under Acevado [sic] I have to prove my prima facie case.

THE COURT: It's a substantial and motivating factor.

MR. SCHWARTZ: Your Honor, yes, that her speech was a substantial or motivating factor behind the decision to eliminate her position. Okay. I have to present a prima facie case.

The burden on the First Amendment [sic] then shifts to them to articulate the legitimate non-First Amendment discriminatory reason. And then the burden stays with them to prove that that was the real reason and that they wouldn't fire her, anyway, even in spite of the First Amendment violation. And that's where the First Amendment [p. 23] -

THE COURT: I don't have it in front of me. We just gave them the ultimate question under the First Amendment.

MR. SCHWARTZ: Under the Title VII formulation, plaintiff bore the burden of proving that the real reason -

THE COURT: Are you saying we made a mistake?

MR. SCHWARTZ: No, no. What I'm saying is that we didn't instruct them fully on the First Amendment burden, because it's a different burden. I made a decision not to do that because it's awfully confusing.

But their burden on the First Amendment count is to prove that they would have fired her anyway and to articulate, they have a burden of articulating the non-discriminatory reasons - what is their nondiscriminatory reason that they articulated.

THE COURT: In any event, the question we put to the jury, I wish I brought it down - maybe you don't have it.

MR. SCHWARTZ: I don't have it here.

THE COURT: Did you prove that the First Amendment retaliation was a substantial and motivating factor?

MR. SCHWARTZ: Right.

THE COURT: And then we asked them the proximate cause issue.

[p. 24] MR. SCHWARTZ: Yes, yes.

I do have it.

THE COURT: What was the question on the First Amendment?

MR. SCHWARTZ: Has Ms. Scott-Harris proven that her protected speech was a substantial or motivating factor in the city's decision to eliminate the position? And they said yes.

THE COURT: All right. When we said "the city," we were talking about - are you saying that we did something wrong in how we charged on that?

MR. SCHWARTZ: No. What I'm saying is she's proven that.

THE COURT: Yes.

MR. SCHWARTZ: They have to articulate a nondiscriminatory reason, the city has to articulate a nondiscriminatory reason. The city did articulate a nondiscriminatory reason, the budget. They didn't articulate different reasons for each councilor. They chose one defense for the city.

THE COURT: And they rejected it.

MR. SCHWARTZ: Right.

THE COURT: But here's the question - maybe I'm getting beyond it. I understand, and I'm not going to reverse the verdict with respect to the individuals. What [p. 25] do I do with respect to the majority of the city council?

MR. SCHWARTZ: If they had come in with different reasons for the different members of the city council voting, then that would have become a fact question. But they only came in with one reason. They came in with one defense and their only defense was money, was finance.

THE COURT: But it could well be they rejected that as to the defendants as two individuals. But it could be that the rest of these city councilors really thought it was a budget thing. They didn't know why it was that they chose one person rather than another person. There is no evidence they did, anyway.

MR. SCHWARTZ: Right. And the way the case was presented to the jury was whether money-saving was a reason, was the reason why the councilors voted to get rid of her.

THE COURT: Right. And what is the evidence that the majority of the city council didn't have money in mind?

MR. SCHWARTZ: Well, the evidence was that it didn't save - the jury could have found that it did not save the city money. That's how I argued to the jury. That's what half of the evidence in the case was. It's going to cost the city more money to get rid of her than to have kept her.

THE COURT: I agree, there was a lot of evidence from which they could have found that that wasn't - the [p. 26] budget wasn't the reason why Mr. Bogan put her on the list or why Ms. Roderick voted that way.

We don't even know what the debate was in the halls of city hall. We don't know whether any city councilor could have been there. They could have been erroneously misled into thinking it was going to save money.

MR. SCHWARTZ: But that wasn't the defense that was presented.

THE COURT: Sure, it was. They said it was budget, right, budgetary?

MR. SCHWARTZ: Yes.

THE COURT: The reason why Bogan and Roderick added her on the list was budget.

And you, because you are an effective lawyer, went through the budget stuff and showed it didn't really save any money. That undercut what the mayor was saying and, to some extent, what Roderick was saying.

But since they were the people precipitating or at least submitting the list, we don't know what they told the city council. We just don't know. The city council could have been like a bunch of -

MR. SCHWARTZ: - sheep.

THE COURT: - sheep, and just said, "Save money. I'm for it."

MR. SCHWARTZ: But what difference would it have [p. 27] made if each of those other city councilors would have gotten up there, just like Bogan, and just like Roderick, and said it was money?

THE COURT: And then, you would have said, "But it didn't save any money." And they would say, "My

God, you are right, Mr. Schwartz, I should never have voted for it."

In other words, if they never heard of the Biltcliffe thing - let's assume they never heard of -

MR. SCHWARTZ: We know one other one did. Mitchell did.

THE COURT: He was the one who called Ms. Scott-Harris?

MR. SCHWARTZ: No, no. Roderick said: I spoke with another city councilor.

THE COURT: So we do know one other, two.

MR. SCHWARTZ: We have two of the eight.

THE COURT: We need three more.

MR. SCHWARTZ: Yes.

THE COURT: What if they were just a bunch of sheep going along with it, duped by these people, who really had a nefarious motive? Then where does that leave us?

MR. SCHWARTZ: Then, they were victims, too, but the action taken by the city that was motivated and proposed would not have happened but for Bogan recommending this to the city council. That action was motivated by, as the jury [p. 28] found, a bad motive.

If Bogan was able to fool the city into taking an action, the city is liable for that. If that's what these councilors want to say, is that "Bogan and Roderick fooled us, gave us wrong numbers," something like that -

THE COURT: What if they said, "We never heard of Biltcliffe in our lives" or "We certainly never heard of it in the context of Scott-Harris. We trusted Bogan and Connors to do the number crunching. They tell us it is necessary, you know, we'll go along with it"?

MR. SCHWARTZ: I think they have to take some responsibility for their votes.

THE COURT: I'm just saying that's the tough legal question for me.

MR. SCHWARTZ: Right.

I think if in every action against a municipality for a civil rights violation taken as part of the public policy or enacted by that body, you have to prove the individual motivation of the majority of the people voting for it, it's really going to -

THE COURT: I think it's a tough burden, I agree.

MR. SCHWARTZ: Yeah. It will eliminate a lot of civil rights cases.

The city is responsible for the action taken by the city. This was not an action taken by nine individuals. It [p. 29] is an action taken by the city to eliminate her. The city came into this court and came up with its justification.

THE COURT: In any legislative body, let's assume there is no absolute immunity. I don't know if the First Circuit would stick with that.

MR. SCHWARTZ: Sure.

THE COURT: In any legislative body, you are bound to have some people with lousy motives. Maybe they want to keep the African-Americans out of the housing project. You know, without mentioning names, we heard comments over time, like in any municipality.

But if the majority are neutrally or benignly motivated, do you hook the city with that, even though a certain subset are voting for the wrong reasons?

Do you see what I'm trying to say?

MR. SCHWARTZ: I see what you're trying to say, but the problem here is that the jury found that the moving force that - but for Bogan making this decision and recommending it to the city council and presenting it to the city council, but for that, it wouldn't have happened.

THE COURT: Okay. But that's a different question. As I was thinking about it, that was the alternative way I had to think about it. I didn't remember any evidence, except possibly the news articles, and I asked about those, from which anyone could infer by a preponderance of the [p. 30] evidence that the majority of the city councilors even knew about it. If there is any, you would have to let me know.

MR. SCHWARTZ: I would really have to agree, because I, myself, have seen plenty of these articles.

THE COURT: Why don't you review? I'll let you supplement for sure.

Let me say for a second, I couldn't think of anything that I reviewed, and I didn't look at every newspaper

article, either, and I remember a couple came in on the issue of damages -

MR. SCHWARTZ: Right.

THE COURT: - as to her grief. Remember, her daughter was so embarrassed. I just don't remember the timing with what, what act, and that kind of thing.

But let's assume for point of view there isn't enough evidence from which you could infer that a majority of the city council voted for impermissible reasons. Are there any cases? Do you have any cases that would say the mere fact of leading people in a legislative body: The mayor, the legal legislation, and the chairperson of the city council, that's enough to get you the causation issue?

MR. SCHWARTZ: So my problem is the first threat or statement. I have never heard raised in a municipality, in a civil rights case before, you have to prove the individual motives of the individuals.

[p. 31] THE COURT: I have never seen a case like this, have you? Has anyone here ever seen a case in which the voting entity on the job decision was a legislative body?

MR. SCHWARTZ: I have two cases. I tried a case before Judge Nelson against the Town of Hull. I have a case before Judge Mazzone right now.

THE COURT: I understand it's against the town, but was it something upon which -

MR. SCHWARTZ: I've got one now before Judge Mazzone, against the Town of Tewksbury, for actions against the board of selectmen.

THE COURT: Have there been any, any appellate decisions on whether or not you have to prove that was a majority of the board of selectmen -

MR. SCHWARTZ: I got a verdict for plaintiffs. It went to the First Circuit. This issue never came up.

THE COURT: Was the instruction the same? That it had to be a majority of the board of the Town of Hull?

MR. SCHWARTZ: No.

THE COURT: Because everyone agreed to that at the time.

MR. SCHWARTZ: No, in the Hull case in the First Circuit, it just wasn't an issue as to what the separate motivations of the different -

THE COURT: Do you have a cite for that?

[p. 32] MR. SCHWARTZ: The Hull case? I cite it in every case I ever do. I don't have it right here. I'll get that.

THE COURT: Do you remember the plaintiff's name?

MR. SCHWARTZ: Yes. Miller against Hull.

THE COURT: We'll find it.

MR. SCHWARTZ: David Miller.

THE COURT: I figured you'd remember the plaintiff's case.

MR. SCHWARTZ: Yes, a great case, with political developments.

THE COURT: For me, this is the legal question for me.

MR. SCHWARTZ: Yes. And I agree, if the plaintiff has to prove the individual motivation of a majority of the city council, it's a hell of a burden.

THE COURT: It is. Doesn't that -

MR. SCHWARTZ: Because these cases normally are proven by circumstantial evidence. I think the jury is entitled to infer that these council members voting on these decisions were aware of the city's finances, they voted on the budget. These people voted to eliminate Janet Scott-Harris' job to save money and they voted to create a job for Dorothy Biltcliffe. Marilyn Roderick agreed to that.

THE COURT: I have no dispute that you disproved [p. 33] the financial basis for it. The question is whether they knew about it or I could reasonably infer they knew about it. Whether that is enough in and of itself to find that it was impermissibly motivated, even if they just sort of rubber-stamped the financial decision without probing more deeply.

MR. SCHWARTZ: The jury certainly could have inferred that Bogan and Roderick presented the elimination of Scott-Harris' job as a money-saver for the city. That's how it was presented to the city council.

Now, the jury also could have inferred that the city councilors were aware of the budget and could have known or should have known that it was not a money-saver.

THE COURT: That, I'm not sure.

MR. SCHWARTZ: Well, as city council members, they certainly should have known that three top positions were empty and that she was filling, she was doing those jobs. You have to expect that they're going to know who the administrators of the city are and who is out on sick leave and who's dead. And if they are presented with the proposal, we're going to save money by eliminating Janet Scott-Harris and hiring these three people, they have to be pretty dumb sheep to be hoodwinked.

THE COURT: You don't have any other federal district or state, supreme or federal court of appeals who [p. 34] really mired through this issue that now the municipalities are people, are viable defendants -

MR. SCHWARTZ: You have to prove each multiple -

THE COURT: - how you go about proving the thing.

MR. SCHWARTZ: Right.

THE COURT: We did some case law research at the time, but it was mostly going to whether it was absolute immunity or not. I didn't see anything in people's briefs that helped me on this or not.

MR. SCHWARTZ: I think what happened, the city came in with one defense. They banked everything that the jury would buy the finance defense.

THE COURT: They admit she was a fine employee. They can't do anything else.

MR. SCHWARTZ: That is their only defense, sure. But they banked everything on that defense and the jury rejected that finances was the real reason.

THE COURT: For those two people, they sure did.

MR. SCHWARTZ: Well, for those two and for the city.

THE COURT: The question is - I agree they did that - was there enough evidence on which they could have done that? I'm struggling with that. I'm just telling you. I don't really know the answer to it.

Because I also worry that - I tell you, it's such [p. 35] a burden to put - it wasn't as if the two people were saying lousy racial comments were fringe elements. They were the mayor - it's almost like a law school example. The chairman of the ordinance committee that was submitting this to the city council. It's a difficult question.

MR. SCHWARTZ: And one other city councilor who Biltcliffe contacted, who the jury could have assumed.

THE COURT: That brings us up to two and you need five to be a majority, right?

MR. SCHWARTZ: Right.

THE COURT: Am I doing the math right?

MR. ASSAD: That's right, Judge.

THE COURT: I'm correct, because the mayor doesn't vote, right, you need a five out of the -

MR. ASSAD: The vote was six to two and they needed five.

THE COURT: All right. We'll take it under advisement.

MR. ASSAD: Judge, may I just respond to one thing?

THE COURT: Yes.

MR. ASSAD: It might help in terms of the argument that was given here in terms of what happens when the mayor sends something to the city council.

By ordinance, the ordinance was introduced here during the trial. For something to happen with respect to [p. 36] the Department of Health and Human Services, the mayor could not do anything on his own, nor could the city council. It needed the mayor to submit it and a majority vote of the city council or nothing happens, Judge, at that point in time.

With respect to the other city councilors, in looking at Janet Scott-Harris and the savings of money, Janet Scott-Harris testified she could do three jobs better than any three people could. And, Judge, the chart that was drawn by Janet Scott-Harris here in this Court showed that she was overseeing three departments.

THE COURT: That cuts in favor of her ability.

MR. ASSAD: She was overseeing.

THE COURT: And she was doing it.

MR. ASSAD: You can't do three 40-hour jobs in one 40-hour period. All I'm saying is, the city councilors

that you have not heard from, Judge, why could they not believe, your Honor, that those individual jobs had to be filled because they have always been filled in the past and there was an intent to fill them in the future?

THE COURT: Can I stay off the record for a second.

(Discussion off the record.)

(Whereupon the hearing was concluded.)

SUPREME COURT OF THE UNITED STATES

No. 96-1569

Daniel Bogan and Marilyn Roderick,

Petitioners

v.

Janet Scott-Harris

ORDER ALLOWING CERTIORARI. Filed June 9, 1997.

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted. In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: Are individual members of a local legislative body entitled to absolute immunity from liability under 42 U. S. C. 1983 for actions taken in a legislative capacity?

June 9, 1997
